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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1208.

JAMES E. BOYD,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, EX REL. JOHN M. THAYER.

Quo Warranto.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR DEFENDANT

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JAMES E. BOYD, Plaintiff in Error, vs. THE STATE OF NEBRASKA *ex rel.* JOHN M. THAYER.	QUO WARRANTO. In Error to the Supreme Court of the State of Nebraska.

BRIEF FOR DEFENDANT.

CONSTITUTION OF NEBRASKA, 1875, ARTICLE V., SECTION 2.

"(Persons ineligible:) No person shall be eligible to the office of Governor or Lieutenant-Governor who shall not have attained the age of thirty years and been for two years next preceding his election a citizen of the United States and of this State. None of the officers of the Executive Department shall be eligible to any other State office during the period or which they shall have been elected." (Adopted 1875.)

Statement of Case.

THE RELATOR, JOHN M. THAYER, FILED HIS INFORMATION IN QUO WARRANTO in the Supreme Court of the State of Nebraska January 13th, 1891, stating that he had been duly elected Governor of the State of Nebraska on the first Monday of November, 1888, had duly qualified and entered on the duties of his office in January, 1889, and ever since then had exercised and was still exercising such duties. That at the election held on the first Monday of November, 1890, defendant JAMES E. BOYD (the plaintiff in error) received for the office of Governor 71,331 votes; J. H. Powers received 70,187 votes; J. D. Richards received 68,878 votes. That the said Boyd, having received the highest number of votes, was by the Speaker of the House of Representatives declared duly elected Governor for the term of two years from the first Tuesday in January, 1891, to the first Tuesday in January, 1893. That the said Boyd took the oath of office and had usurped and invaded the office of Governor of Nebraska and unlawfully attempted and now attempts to hold the said office and perform its duties. That the said Boyd was not at the time of his pretended election on the first Monday of November, 1890, a citizen of the United States, and was not, under the Constitution of the State, eligible to the office of Governor of the said State, the said Boyd being an alien born, and never having become a citizen of the United States. The information prays judgment that the said Boyd be declared not entitled to the said office; that he be ousted therefrom, and that the said Thayer

be adjudged to be entitled to such office until such time as a person eligible thereto shall be elected and qualified as his successor.

AN ANSWER WAS FILED by Boyd, the respondent, setting forth certain facts and referring to certain statutes —Federal and State—under which the said Boyd claimed that he was eligible to the office of Governor at the said election in November, 1890. The facts shown by the information and answer bearing upon the question of the said Boyd's eligibility to the said office appear in the Chronological Statement of Facts below given.

A DEMURRER TO THE ANSWER was filed by the relator on the ground that the answer did not state facts sufficient to constitute a defense to the information and that the said answer on its face showed that the respondent, Boyd, was an alien and ineligible to the office of Governor at the said election in 1890, and that he had unlawfully usurped that office.

At the January Term, 1891, demurrer was argued and judgment entered thereon that Boyd be ousted from the said office and that the said Thayer be reinstated therein. From that judgment the present writ of error from this Court to the Supreme Court of Nebraska is taken.

CHRONOLOGICAL STATEMENT OF FACTS SHOWN BY THE RECORD.

1834. James E. Boyd (the plaintiff in error) was born in Ireland of alien parents (p. 5, p. 18).

1844. James E. Boyd was brought to the United States when ten years of age by his father, Joseph Boyd, and settled in Ohio, at Zanesville,

Muskingum County (p. 5, p. 18), where he, Joseph Boyd, has ever since resided.

1849, March 5th. Joseph Boyd, the father of James E. Boyd, at Zanesville, Muskingum County, Ohio, declared his intention to become a citizen of United States (p. 5), and at which time James E. Boyd was about fourteen years of age (p. 18).

1854, May 30th. Act of Congress passed to organize the Territories of Nebraska and Kansas.

1856. James E. Boyd, when 22 years of age, left his father's home in Ohio and went to the State of Iowa (pp. 19, 20).

1856, August. James E. Boyd removed from Iowa to Territory of Nebraska (p. 20).

1857. James E. Boyd was elected County Clerk of Douglas County, Nebraska (p. 20).

1858, Autumn. James E. Boyd removed to Buffalo County, Nebraska (p. 20).

1864, April 19th. Enabling Act of Congress approved.

1864. James E. Boyd was sworn into military service during an Indian trouble (p. 20).

1866. James E. Boyd was elected a member of the Nebraska Legislature (p. 20) and served one session.

1866, February 9th. First Constitution of Nebraska approved.

1867, March 1st. Proclamation of President Andrew Johnson declaring Nebraska admitted into the Union as a State.

1868. James E. Boyd removed from Buffalo County to Douglas County, Nebraska, where he has since resided.

1871. James E. Boyd was elected a member of Convention to frame a State Constitution (p. 20) and served as a member of Convention.

1875. James E. Boyd was elected to and served as member of Convention to frame State Constitution (p. 20).

1880. James E. Boyd was elected and acted as president of City Council of City of Omaha (p. 21).

1881. James E. Boyd was elected Mayor of City of Omaha and served two years (p. 21).

1885. James E. Boyd was again elected Mayor of City of Omaha and served two years (p. 21).

1888. JOHN M. THAYER (the relator and defendant in error) was elected Governor of the State of Nebraska for a term commencing in January, 1889, for a period of two years and until his successor shall be elected and qualified (pp. 4, 17).

1890, October. Joseph Boyd, the father of James E. Boyd, in the Court of Common Pleas of Muskingum County, Ohio, was naturalized as a citizen of United States (pp. 7, 19).

1890, November. At an election for Governor James E. Boyd received 71,331 votes; J. H. Powers received 70,187 votes; L. D. Richards received 68,878 votes; scattering, 3,694 votes. Total 214,090 votes (p. 4).

1890, December 16th. James E. Boyd made his application in United States District Court for District of Nebraska, to become a naturalized citizen of United States (p. 24), and on same day was naturalized as a citizen of the United States (p. 23).

ARGUMENT.

James E. Boyd, the plaintiff in error, had not been for two years next preceding his election a citizen of the United States, and hence under the Constitution of the State he was not eligible to the office of Governor. He was not a citizen of the United States even at the date of the election.

By Section 2, Article V., of the Constitution of the State of Nebraska, before quoted, it is ordained that no person is eligible to the office of Governor unless he has been a *citizen of the United States, as well as of the State of Nebraska, for two years next preceding his election.*

From the facts alleged in the information and admitted in the answer, it appears that James E. Boyd was born in Ireland in 1834 of parents then living in Ireland, and subjects of the Queen of Great Britain and Ireland (Record, p. 5, top, and p. 18, fol. 36). When James E. Boyd was but ten years of age he removed from Ireland to the United States with his parents. His father, Joseph Boyd, settled in Zanesville, Muskingum County, Ohio, about 1844, where he has ever since resided (p. 5, top, p. 18, fol. 36). On the 5th day of March, 1849, Joseph Boyd, the father, and a native of Ireland, declared it to be his intention to become a citizen of the United States, in the Court of Common Pleas of Muskingum County, State of Ohio (p. 5, top, p. 18, fol. 36). At that time James E. Boyd was about fifteen years of age. Joseph Boyd, the father, took no further steps towards being naturalized while the said James E. Boyd was under twenty-one years of age, and never made application to be naturalized as a citizen of the United States until October, 1890. At this last date Joseph Boyd (father) made application to the Court of Common Pleas in said County of Muskingum and State of Ohio to become a citizen of the United States, and on which last date, it being made to appear to the Court that Joseph Boyd had declared his intention to become a citizen of the United States as hereinbefore stated, to wit, on the 5th day of March, 1849, he was, by order of that Court, at the October Term, 1890, naturalized as a citizen of the United States (copy of the journal entry of naturalization, p. 7); (Record, p. 19, fol. 38.)

It will thus be seen that James E. Boyd was fifty-six years of age at the date of the naturalization of his

father. James E. Boyd, personally, never made any application to be naturalized as a citizen of the United States until the 16th day of December, 1890, which was after the date of the election at which a plurality of votes was cast for him for the office of Governor of the State of Nebraska (copies of the record of naturalization of James E. Boyd, Record, pp. 22, 23, 24).

Boyd not a citizen of the United States under Section 2172 of the Revised Statutes

James E. Boyd cannot claim to have become a citizen of the United States under the provisions of Section 2172 of the Revised Statutes of the United States, quoted in the appendix hereto, for the reason that he was not under twenty-one years of age at the date of the naturalization of his father. To bring James E. Boyd within the provisions of that section (which is the Act of April 14, 1802) James E. Boyd must have been "under the age of twenty-one years at the time of the naturalization of his father" (see Section 2172, quoted in Appendix hereto).

"In the case of Campbell vs. Gordon, 6 Cranch, 176, the Supreme Court of the United States put this construction upon this Act of Congress. The Court says:

"This act declares that the children of persons duly "naturalized under any of the laws of the United "States, being under the age of 21 years at the time of "their parents' being so naturalized, shall, if dwelling "in the United States, be considered as citizens of the "United States. This is precisely the case of Mrs. "Gordon. Her father was duly naturalized, at which "time she was an infant."

In Gumm vs. Hubbard, 97 Mo., 311, a similar construction was placed upon the act. The Court said:

"The record discloses a case where a widow and her "son, both of foreign birth, came to the United States, "and while the son was yet a minor the mother married "a citizen of the United States. Section 1994, Re- "vised Statutes United States, declares that 'Any "'woman who is now, or may hereafter be, married to "'a citizen of the United States, and who might her- "'self be lawfully naturalized, shall be deemed a citi- "'zen.' The marriage of the mother with a citizen "made her a citizen. Her minor son became a citizen "by operation of Section 2172, Revised Statutes "United States."

The case of the State vs. Pinney, 10 Ark., 621, is one where the defendant was held to be a citizen of the United States. It appears from the case that the father became naturalized during the minority of the defendant.

In O'Connor vs. The State, 9 Fla., 234, Petray, a member of a jury was held to be a citizen of the United States. The Court said:

"The evidence on this point is that the juror was "born in Bavaria; came to this country, while an in- "fant, with his father; has never taken out naturali- "zation papers, but his father did many years ago and "while the juror was still an infant."

In United States vs. Keller, 13 Fed. Rep., 82, HARLAN, J., used this language:

"The mother of the defendant having thus become "a citizen by force alone of her marriage with a nat- "uralized citizen in the year 1868, did not the defend- "ant, being then a minor and dwelling in the United "States, himself also become *ipso facto* a citizen? It "seems to the Court that this question must be an- "swered in the affirmative."

THE FACTS PLEADED IN THE ANSWER TO THE EFFECT THAT JAMES E. BOYD HAD EXERCISED THE ELECTIVE FRANCHISE IN NEBRASKA FOR A GREAT MANY YEARS AND THAT HE HAD HELD OFFICE AS A MEMBER OF THE LEGISLATURE, AS A MEMBER OF THE CONSTITUTIONAL CONVENTION AND AS MAYOR OF THE CITY OF OMAHA DID NOT MAKE HIM A CITIZEN OF THE UNITED STATES.

It may be true that James E. Boyd believed himself during all those years to have been a citizen of the United States, but that is immaterial. Aliens can only become American citizens through the process of naturalization.

THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, Section 8, grants to Congress the power "To establish an uniform rule of naturalization." Congress did legislate upon this subject during the first years of the Government and we have had naturalization laws ever since, which provide the way and the only way that an alien can become a citizen of the United States, with the exception of what may be termed "collective naturalization" by treaty or cession of occupied territory by some foreign government. An alien cannot grow into citizenship in this country by belief or faith. An alien cannot become a citizen by assuming to act as a citizen. An alien, through the ignorance of the people of his true condition, may be able for a number of years to exercise the elective franchise, to hold office and to exercise the general functions of American citizenship, yet these things cannot make him a citizen of the United States. It is apparent, on the mere suggestion, that James E. Boyd was permitted to exercise these various functions of American citizenship under

a misapprehension of his true condition. It will not be supposed that if it had been known to the people of Nebraska that James E. Boyd had never been naturalized, and was not a citizen of the United States, that he would have been permitted to exercise the privileges and offices which he enjoyed. It will not do to permit the argument to prevail that James E. Boyd should be adjudged to be a citizen of the United States, because the people of Nebraska, through ignorance of his alienage, permitted him to vote and hold office.

The Case of Dryden vs. Swinburne.

Every argument that could be suggested or made in favor of the citizenship of James E. Boyd, growing out of the facts pleaded in his answer, is fully met and answered in Dryden vs. Swinburne, 20 West Va., 89. In that case the facts are remarkably similar to the facts pleaded in the answer herein.

Thomas Swinburne was elected Clerk of the Circuit Court of Kanawha County in 1878. He was born in England of English parents, and resided in England until eleven years of age; and his father, Ralph Swinburne, was naturalized in the year 1866, at which time Thomas Swinburne was not a minor, but twenty-six years of age. Thomas Swinburne entered the military service of the United States, and received his discharge January 24th, 1865. On the 9th day of November, 1878, after his election to the office of Clerk of the Circuit Court, he was naturalized by an order of the Circuit Court of Raleigh. That Court, in the judgment of

naturalization, made an order declaring Thomas Swinburne to be a citizen of the United States from the date of his discharge as a soldier from the service of the United States, to wit, January 24th, 1865. His father, Ralph Swinburne, supposed that he had become a citizen of the United States about the year 1856. In 1855 Ralph Swinburne, father, received the title of lands by deed of conveyance. The State never took any steps to forfeit his title to the lands by reason of the fact that he was an alien. From 1855 Ralph Swinburne exercised the rights of a citizen, and from that time until the breaking out of the war he voted and took an active part in elections. Ralph Swinburne, when required to produce his naturalization papers in order to become registered as a voter, found that he did not have such papers, and thereupon became naturalized on the 5th day of June, 1866, just precisely as did Joseph Boyd, the father of James E. Boyd, in this case. This is precisely what James E. Boyd did when he found that his father had not been naturalized during his, James E. Boyd's, minority. James E. Boyd went before the District Court of the United States for the District of Nebraska on the 16th day of December, 1890, and became naturalized, but this was more than two years too late to make him eligible to the office of Governor.

There was in the West Virginia case every element of good faith that can be found in the case of James E. Boyd. There existed in the West Virginia case the exercise of the privileges and functions of a citizen of the United States, as were exercised by James E. Boyd. Every fact in the case of James E. Boyd which appeals

to the favorable consideration of the Court was found in the West Virginia case.

We quote at considerable length from the opinion.

Naturalization Order Cannot Be Made Retroactive.

The Court said:

"It remains now to decide this case on its merits. The principal question involved in this case is: Was Thomas Swinburne at the time of his election and qualification as Clerk of the Circuit Court of Kanawha County in October, 1878, eligible to this office? This depends upon whether he was then a citizen of the State of West Virginia. That he was born in England of English parents, who were residents and citizens of Great Britain is admitted, and that he resided there till he was eleven years of age. But he claims that on the 9th day of November, 1878, after his election and qualification as such clerk, and after this suit had been instituted, he was naturalized by an order made by the Circuit Court of Raleigh, and by this order he was declared a citizen of the United States from the date of his discharge as a soldier from the service of the United States; and that this discharge was dated January 24, 1865, long prior to his election and qualification as such clerk. His counsel insist that, whether this declaring in this order that his qualification as a citizen should thus date back some twelve or thirteen years was or was not proper, it was an order made by a court authorized to naturalize foreigners, and therefore must be held as valid in this, which is called a collateral proceeding.

"Now, the notice which had been given him of this contest in express terms alleges that he was not and never had been a citizen of the United States or of the State of West Virginia, so that this question was and is the direct question in issue in this case. BUT IN TRUTH, THIS ORDER MADE BY THE CIRCUIT COURT OF RALEIGH, SO FAR AS IT ATTEMPTED TO MAKE HIM A CITIZEN FROM A PERIOD ANTEDATING THE ORDER TWELVE OR THIRTEEN YEARS, WAS A PERFECT NULLITY. Neither that Court nor any other Court had any pretense of authority to make a person a citizen or to confer on him the rights

of a citizen from a time *antedating the order of the Court naturalizing him*, to the extent that Court attempted to confer citizenship prior to the time when it entered this naturalization order, it acted without any authority or jurisdiction, and its act was to this extent from the beginning utterly null and void. This was the opinion of the County Court in this case, and in this it was clearly right.

Section 2172, Rev. Stats., Construed.

"But it is claimed by the counsel of Swinburne that he was in October, 1868, a citizen of the United States and of West Virginia, *because his father, Ralph Swinburne, was naturalized in the year 1856, and that he, Thomas Swinburne, was then a minor only sixteen years of age, and by virtue of the prior clause of Section 2172 of the Revised Statutes of the United States, p. 328, he became a citizen from that time.* If the facts be as claimed, unquestionably Thomas Swinburne has been a citizen of West Virginia from its organization and was eligible to the office of Clerk of the Circuit Court of Kanawha at the time of his election. But the County Court, who heard all the evidence in the case, came to the conclusion that it was not proven, that in point of fact Ralph Swinburne, *his father, was ever naturalized until the year 1866*, AT WHICH TIME THOMAS SWINBURNE WAS NO LONGER A MINOR, BEING THEN TWENTY-SIX YEARS OF AGE. They say in their opinion: 'There 'is no record of any proceedings by which Ralph Swin-'burne was naturalized in 1856. He says he took 'the oaths required by law before Mr. Quarrier, or 'the Court, and remembers that Mr. Quarrier said 'to him that if any person questioned his being 'a citizen to send them to him; but this 'is no evidence of the examination of witnesses, the 'proof of residence, of character, of attachment to the 'Government of the United States or of the judgment 'of the Court, all of which are necessary to make a 'citizen of a foreign subject. There is much in the 'evidence going to show that Ralph Swinburne sup-'posed he had become a citizen from about the year '1856; but these circumstances do not amount to 'proof, particularly as he is here and might have fur-'nished from his recollection the whole facts, in-

'cluding the names of witnesses who proved his char-
'acter, residence and attachment to the United States
'and also the judgment of the Court.'

"This is sufficient to conclude this controversy as to the fact whether Ralph Swinburne was or was not naturalized in 1856. It is not the province of this Court or of the Circuit Court to supervise or overrule, on a writ of *certiorari*, the conclusion of the County Court on an inference of fact drawn from the evidence, when such inference is sustained by substantial evidence, even though we might have drawn a different inference from the evidence. But in this case we are satisfied that the inference of fact, which the County Court draws, is entirely correct and is fully sustained not only by the negative facts and circumstances to which the Court refers, but also by very strong positive evidence; and we are further satisfied that the circumstances relied on to prove this naturalization of Ralph Swinburne in 1856, when taken together, are very weak.

Naturalization not presumed from receiving a conveyance of land, voting, &c.

"The first in point of time of these circumstances is a deed from Andrew Cunningham and wife to Ralph Swinburne, dated November 21, 1855, and duly recorded on that day, conveying to him a farm of 186 acres in Kanawha County, on which he has since resided. This is regarded by the defendant's counsel as very strong evidence that he was naturalized, as the State took no steps to have his land declared forfeited as held by an alien. And if such evidence was admissible, it would be the very strongest circumstance from which naturalization might be inferred of any of those offered in proof in this case. But, it seems to me it would be very unsatisfactory evidence, certainly very far from conclusive, for if it could be regarded as conclusive the State never could have land declared as forfeited because held by an alien. It would be strange law indeed, if in such a proceeding the holding of the land, should itself be regarded as satisfactory evidence of the right to hold and own the land. But, unfortunately for the defendant, it is conclusively proven that Ralph Swinburne was, when he bought this land, unquestionably an alien. He does not, even in his own testimony, pre-

tend to date his naturalization prior to 1856; nor is there a particle of testimony to indicate that at that time or prior thereto he had ever voted or exercised any of the rights of citizenship. But the purchase of this farm does unquestionably prove *that Ralph Swinburne believed then that he was a citizen, and from his subsequent conduct, and from what he has said, I am bound in charity to believe that he supposed in 1855, when he bought this land, that he had been a citizen from December 7, 1852, when he appeared before the Circuit Court of Kanawha and declared his intention to become a citizen, and took an oath of allegiance to the United States and an oath relinquishing and renouncing forever allegiance and fidelity to any foreign prince, potentate, State or sovereignty whatever and particularly all allegiance and fidelity which might be claimed by Victoria, Queen of Great Britain and Ireland, or any of her successors.* He in his declaration of December 7, 1852, had declared his intention to renounce and relinquish this allegiance, and being a foreigner unacquainted with our laws, he may well after the lapse of several years have taken up the impression that he had thus become a citizen of this country. His purchase of this land in 1855 goes very far to prove that he then so thought; and it is quite natural that he may after many years have been under the impression that he took the necessary oaths, including the oath of renunciation of allegiance to his former sovereign, instead of having merely declared his intention to renounce such allegiance. His subsequent conduct and declaration I feel bound in charity to consider as showing that he thought he had taken such oaths years before in 1852.

"After purchasing a farm and moving on it to reside in 1855, it was natural that Ralph Swinburne, who was then certainly an alien, but who obviously but erroneously thought himself a citizen, *should afterwards exercise the rights of a citizen;* and accordingly from that time till the war broke out *he voted and took an active part in elections;* and in 1858, having become a Baptist preacher, on March 15 he applied to the Circuit Court of Kanawha for testimonials, which would authorize him to administer the rights of matrimony, and took the required oath to obtain such testimonials, an oath of allegiance to the commonwealth of Virginia. All

these acts show clearly that Ralph Swinburne from 1855 to the breaking out of the war was under the impression that he was a citizen of the United States and had been duly naturalized; but he admits, that when the most important of these acts, the purchase of his farm in 1855, occurred, he was in fact an alien; and this being admitted, the other acts do not even tend to show that he was naturalized after 1855, but only show, what was perfectly natural, that the false impression then clearly shown to be on his mind continued there. NOR DOES THE FACT, THAT HE VOTED, TOOK PART IN ELECTIONS AND MARRIED PEOPLE AFTER 1855, TEND IN ANY BUT A VERY WEAK MANNER TO SHOW THAT HE WAS REALLY A CITIZEN; for after he bought and removed on to his farm in 1855 the inevitable conclusion which the public would draw was that before so doing he had become naturalized, which it is not now pretended that he had. His statement to the Confederate officer, when he was under arrest, that he could not conscientiously take an oath to support the Confederate States because he had taken an oath of allegiance to the United States, would appear to indicate, what was not unnatural, that he supposed then that he took his oath in 1852 when he made his declaration; but his subsequent consent to take this oath of allegiance would rather seem to show that when he made the statement, that he had taken an oath of allegiance to the United States, he merely meant to deceive and mislead the Confederate officer; but perhaps this consent was the result of human weakness and the misleading advice of friends, as he states.

Order Admitting to Citizenship Rebuts Any Previous Naturalization.

"In 1866, after the war, and when the law required voters to be registered, when Ralph Swinburne offered to register as a voter, the registrar required of him to produce the evidence that he was a citizen—his naturalization papers. He said he did not have them, they were in the Clerk's office; referring, I would presume, to the papers of 1852—his declaration; for we have seen that as early as 1855 he thought that these declaration papers made him a naturalized citizen. A

few days after the registrar told him that he could not find in the Clerk's office his naturalization papers, AND WITNESS THEN WENT BEFORE THE CIRCUIT COURT ON JUNE 5, 1866, AS AN ALIEN, AND AS SUCH ASKED TO BE ADMITTED TO CITIZENSHIP; and having proved that he had resided in the United States for five years, and within West Virginia for one year at least, and had complied with all the other requisites, and having taken an oath to support the Constitution of the United States, and that he renounced all allegiance to Victoria, Queen of Great Britain, it was ordered that he be admitted and declared to be a citizen of the United States. *Thus he seems to me to have done what it was perfectly natural that he should do, as soon as he found that the impression under which he had been laboring since 1855, that he was a citizen, was false;* THAT IS, HE AT ONCE TOOK THE NECESSARY STEPS TO BECOME A NATURALIZED CITIZEN. Nor did he, when informed that no naturalization papers were to be found in the Clerk's office, according to his own statement, act as one would have naturally acted who knew that he had been regularly naturalized in 1856 or 1857. He did not, so far as the record shows, and he does not say he did, go to the Clerk to make for him a copy of these papers from the record-book, nor did he examine the record-book of 1856 and 1857 to find an order which he now says was, as he then thought, on the books. *But he put himself to the trouble and expense of getting his friends to attend the Court to prove his character, and, admitting himself to be an alien, took the required oaths of naturalization.*

"This conduct, it does seem to me, shows beyond doubt that in 1866 Ralph Swinburne knew that he had never taken out his naturalization papers, and that prior to that time he did not know that it was necessary for him to do so in order to be a citizen. *He now comes forward and testifies that in 1856 or 1857 he took the oath of allegiance* and naturalization, and that it was administered either by the clerk or the court; that the clerk told him when he first took the oath that he had not time to write his papers, but would do so as soon as he got leisure, and if any one disputed his having taken the oath, to send him to the clerk's office. The record books of this clerk's office are unmutilated and accessible; and these books have been carefully

searched, and it appears from them that *no entry was ever made of his naturalization in those years or at any time prior to 1866.* Ralph Swinburne does not state who were the witnesses whom he must have produced in court to prove his character, etc., if he was naturalized in 1856 or 1857; and it can hardly be supposed that he has forgotten who they were, and could yet correctly remember the oath which he took, and what the Clerk said to him. The production of these witnesses was certainly very necessary under the circumstances to render his statement even probable, and their absence satisfies me that he is laboring under a mistake, and that in his mind the old mistake which he was laboring under certainly in 1855 when he bought his farm, has again been revived, and that he is confounding the declaration which he made in 1852 with the imaginary naturalization in 1856 or 1857.

"The fact that Thomas Swinburne was registered in 1866 and for the next five years as a voter and held offices without objection, is regarded as additional evidence that his father, Ralph Swinburne, was naturalized while he, Thomas Swinburne, was an infant, that is, prior to 1862, for it is not pretended that Ralph Swinburne himself was naturalized while he was thus being registered and holding offices. But it is obvious on the face of all these register books that Thomas Swinburne has not registered, because it was supposed his father had been been naturalized before 1862. On their face these books state that Ralph Swinburne was naturalized in 1866. It would seem then that Thomas Swinburne was registered as a voter, either for the insufficient reason that he had served in the United States army, or because of the utter carelessness or unreasoning prejudice of the registrars. These books showed that he was not entitled to vote, for they showed *that his father was an alien till* 1866, and that the *son was also an alien*, AND THAT HE WAS MORE THAN TWENTY-ONE YEARS OF AGE WHEN HIS FATHER WAS NATURALIZED IN 1866, for his age is stated in these registrar books. We can therefore only infer from Thomas Swinburne's voting and being allowed to hold office, that those whose duty it was to declare by their registrar books who could hold office and vote, performed this duty in a grossly negligent manner or

with prejudices so strong as to blind them to the proper performance of these duties."

Parol Evidence Held not Competent.

The Court in the opinion then proceeds to examine whether parol testimony can be received or considered for the purpose of showing that one born in a foreign country had become naturalized, and after a critical examination of a large number of cases, concludes that parol evidence for such purpose is not admissible and cannot be considered.

The Court holds that the only evidence of naturalization would be the judicial records by which the foreigner was admitted and declared to be a citizen.

The Court then proceeds:

"Our conclusion is that when the record book of a court before which it was claimed a foreigner was naturalized, is produced, and on its examination it appears that he was not naturalized, *no parol proof can be received that he was naturalized before this Court, nor can any fact such as his voting or holding office, in such case be introduced as the foundation for the presumption that he has been naturalized, there being in such case no room for any such presumption.*"

"But the present case is still stronger against the defendant, for in this case the record book of the Circuit Court of Kanawha was produced, and it appeared thereby that *on the 15th day of June, 1866, Ralph Swinburne was an alien owing allegiance to Victoria,* Queen of Great Britain and Ireland, and as *such alien* he on that day appeared before said Court and ASKED TO BE ADMITTED AS A CITIZEN of the United States, and having complied with the law and taken the oath to support the Constitution of the United States and to renounce his allegiance to Queen Victoria *he was admitted as a citizen of the United States.* And now it is gravely insisted that in contradiction of this record it may be proven by parol that he had not owed allegiance to Queen Victoria for years prior to this time, and that he

was not at that time, and had not been for years, an alien, and that he was not admitted at that time, as the record says, to citizenship, but had been a citizen for years prior to that time. It seems to me such parol testimony ought not to have been received and cannot be considered by this Court. Its receipt would be in violation of fundamental principles of evidence, which have not been and cannot be disputed.

The Word "Now" in Sec. 2172 Construed.

"The only other ground on which the defendant claims that he was naturalized at the time when he was elected and qualified as Clerk is, that by virtue of the last clause of Section 2172, page 382, of the Revised Statutes of the United States (1873) he became a citizen from the date these Revised Statutes went into effect, December 1, 1873, as his father, Ralph Swinburne, was certainly naturalized before that time, that is, in 1866. This section is as follows :

"SEC. 2172. 'The children of any persons who have 'been naturalized under any law of the United States 'or previous to the passage of any law on that subject 'by the Government of the United States, under the 'laws thereof, may have become citizens of any one of 'the States, under the laws thereof, being under the age 'of twenty-one at the time of the naturalization of their 'parents, shall, if dwelling in the United States 'be considered citizens thereof; and the children 'of parents who are now, or have been citizens of 'the United States, shall, though born out of the limits 'and jurisdiction of the United States, be considered as 'citizens thereof; but no person heretofore proscribed 'by any State or who has been legally convicted of 'having joined the army of Great Britain during the 'revolutionary war shall be admitted to become a citi-'zen without the consent of the Legislature of the 'State in which such person has been proscribed.'

"It is claimed that by virtue of the last clause of this section Thomas Swinburne became a citizen December 1, 1873, when these Revised Statutes took effect, without any action on his part and even in opposition to his wishes, though he was an admitted alien the day before, and though *he was then thirty-three*

years of age, simply *because* his father, Ralph Swinburne, *was naturalized in 1866, when Thomas Swinburne was twenty-six years old.* If this be the true construction and effect of this section, it would equally have operated against his consent to have made Thomas Swinburne a citizen of the United States, though we had been at war with England, and though Thomas Swinburne had been in the army of Great Britain, to which country he then owed allegiance; and if he had been taken prisoner by us after December 1, 1873, he could have been put to death as a traitor. And this would be equally the consequence and result of this interpretation had Thomas Swinburne never left England, where he was born. SUCH RESULTS OF THIS CONSTRUCTION ARE SO OBVIOUS, SO UNJUST AND SO ABSURD THAT IT IS HIGHLY IMPROBABLE THAT THIS IS ITS TRUE MEANING.

"The counsel for the contestant have contented themselves with pointing out the absurd results to which this construction would lead, and have referred to no authorities to aid in its true construction, except that they have filed with their brief a letter from Hon. G. S. Boutwell and another written by the direction of Senator Edmunds of Vermont, in which letters these gentlemen give it as their opinion that the word children, as used in the latter clause of this section, means minor children. They assign no reason for their opinions and refer to no authorities. Their letters therefore were not filed by the counsel for the plaintiff as arguments and must have been regarded as authorities. How they could have supposed that the private opinions of these gentlemen would be regarded as authority by this Court, I cannot account for. These private opinions are entitled to no consideration or weight. It is but just to these gentlemen to say that there is nothing on the face of their letters to show that they ever supposed that they would be used as authority in this or any other court.

"The counsel for the defendant, on the other hand, refer to no authorities to aid in the construction of this section except *Charles vs. Munson & Bromfield Manuf. Co.*, 17 Pick., 70, and *Campbell vs. Gordon*, 6 Cranch, 176; and neither of these cases throw any real light on the interpretation of this section, so far as such interpretation would affect this case. This sec-

tion of the Revised Statutes is *verbatim* the language used in an Act of Congress passed April 14, 1802. Everything that is said in 17 Pick. on the subject (see page 76) is: 'As to the plea of alienage we think it is 'well answered by the replication. The Statute of the 'United States passed April 14, 1802, provides that the 'children of persons, who then were or had been 'citizens of the United States, should be considered as 'citizens with a proviso not affecting the present ques-'tion. The replication brings Miranda Charles within 'the description by showing that her father had been 'a citizen of the commonwealth after the treaty of 'peace and after the adoption of the Constitution. It 'does not distinctly appear when her father died, nor is 'it material.

"'In the case of *Manchester vs. Boston*, 16 Mass., 230, this statute came under the consideration of the Court. They say: 'Without doubt, the object of Con-'gress in making this provision was to naturalize the 'children of actual citizens who might be born abroad, 'whether their parents were living or not at the time 'of passing the act.' The Court is therefore of opinion that the plea of the alienage of Miranda, one of the complainants, cannot be sustained.

"It is true this replication did not state that Miranda was an infant at the time of the passage of this act; but it is also true that no objection was made by counsel to it on that account, but it was insisted that by this act both of the parents of a child born out of the jurisdiction of the United States must have been citizens of the United States to confer citizenship on the child, and this fact was not alleged in this replication. It does not distinctly appear whether she was an infant in 1802 or not, but the evidence as stated does show that in all probability she was a small child. It is obvious, therefore, that the Court neither expressed an opinion upon nor considered the question whether, if she had been twenty-one years of age in 1802 she would have become a citizen on the passage of this act, because her father had been naturalized, though she was born in Canada. Neither the case in 16 Mass. nor that in Cranch, referred to, throw any light on the question under discussion.

"In the absence of authority, I am of opinion that the words used in the latter part of Section 2172

should be construed as if they read, 'and such children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof.' Minor children had just been spoken of in the previous portion of this section, and by the word 'children' in the latter portion of this section was meant such children as had been just named; adult children were excluded from its operation. If this construction were not given, and if the word 'children' in the last portion of this section were interpreted to mean children of all ages and wherever residing, the statute would lead to absurd results, making citizens of persons who were, perhaps, born of alien parents, and who were living in a foreign land, and who had resided till they were old men, and still resided, in the country to which was due their allegiance. Such absurd results will be avoided by a very natural construction of the language and merely by interpreting the word 'children' in the latter part of the section to refer to the same class of children as had just before been spoken of. The latter clause of this section would then operate by making such children, though born out of the jurisdiction of the United States, citizens of this country.

"But even if it should be considered that this construction cannot be placed on this Act of 1802, and that the word 'children,' in the latter part of this section, was intended to include, and did include, adult children, yet such construction could in no manner affect this case.

"The Revised Statutes of the United States had their origin in an Act of Congress passed June 27, 1866, Ch. 140, Sec. 14, p. 74, found in the Appendix to the Revised Statutes of the United States, Second Edition, p. 1089. This act provided for the appointment of a commission 'to revise, simplify, amend and consolidate all 'statutes of the United States, general and permanent 'in their nature, which shall be in force at the time 'such commissioners shall make the final report of 'their doings.' In the performance of their duty they incorporated in their report, as adopted by Congress, this Section 2172 precisely as it was in the Act of 1802, the language being in no manner changed. At the close of these Revised Statutes, Title 74, it is provided,

p. 1085, Sec. 5595: 'The foregoing seventy-three 'titles embrace the Statutes of the United States, 'general and permanent in their nature, in force on the 'first day of December, 1873, as revised and consoli 'dated by commissioners appointed under an Act of 'Congress; and the same shall be designated and 'cited as the Revised Statutes of the United States.' Section 5596 provided: 'All acts of Congress passed 'prior to said first day of December, 1873, any portion 'of which is embraced in any section of said revision, 'are hereby repealed.'

"This Section 2172, the same *verbatim* as the Act of 1802, uses this language: 'And the children of persons 'who *now* are or have been citizens of the United 'States shall, though born out of the limits and juris- 'diction of the United States, be considered as citizens 'thereof.' The County Court, in their opinion, regard this section as if after the repeal of the Act of 1802, at another session of Congress, it had been again re-enacted in the same words. So that while the Act of 1802 was in force the word 'now,' used in it, meant 'the year 1802,' but that the identical same words, if used in a new statute enacted subsequently to the repeal of the Act of 1802, would have a very different meaning, and the word 'now' would be construed as referring to the date of the new enactment of this law. If this Act of 1802 had been repealed prior to the passage of the Revised Statutes, the word 'now,' used in this Section 2172, would certainly mean December 1, 1873. But the Act of 1802 was not repealed prior to the passage of the Revised Statutes. In fact, the above section has been in full force from the date of its passage to this time; for while in words it was repealed by Section 5596, yet at the very moment of its nominal repeal it was in the very same act, Section 2172, continued as law in the same words in which it had always stood. So that there has never been a moment of time since 1802 when this Section 2172 has not been a law. This revision and arrangement of the statutes in force, when it uses the same language as an old statute, must be regarded as merely continuing it in force, and it is in no manner affected by the revision. I am, therefore, of the opinion that this Section 2172 is but the Act of 1802 continued in force; and that it was not the purpose of Congress in any

manner to alter, modify or change the law, so far as it was contained in the Act of 1802 as copied in Section 2172; and that the word 'now,' as used in this section, means precisely what it did before, and has reference to the time when these provisions in Section 2172 first became law, that is, to the year 1802.

"This being the meaning and true interpretation of this Section 2172 it is entirely immaterial so far as this case is concerned, in what sense we understand the word 'children' used in the latter part of this section; for it will in effect read: 'The children of persons who in 1802 or prior thereto had been citizens of the United States shall be considered citizens thereof.'

"Of course Thomas Swinburne could claim he had no rights of citizenship under this last clause of this section so interpreted. And we have seen heretofore that under the first clause he could claim no such rights, AS HE WAS MORE THAN TWENTY-ONE YEARS OF AGE WHEN HIS FATHER WAS NATURALIZED IN 1866. *Nor can he claim in this controversy any right of citizenship because of his own naturalization, as he was not naturalized till after this proceeding was instituted.* MY CONCLUSION IS, THAT HE NEVER WAS A CITIZEN OF THE STATE OF WEST VIRGINIA or entitled to be considered a citizen of this State till November 9, 1878, when he was naturalized by the Circuit Court of Raleigh; and that this naturalization took effect then and had a PROSPECTIVE OPERATION ONLY, and did not, as the order making it ineffectually declared, operate from the time of his discharge from the service of the United States or from any previous time.

Registration as a Voter does not Establish Citizenship.

"There are several positions of the counsel for the defendant of which I have thus far taken no notice, because it did not seem to me they were worthy of serious consideration; but as they have been earnestly pressed, I will briefly state my views of them.

"It is urged that the fact that Thomas Swinburne was registered by the registrars as a voter unappealed from and unquestioned by any proceeding for the purpose, is conclusive that he was a voter, and that, like any other

judgment, it is not only conclusive of this fact, but of every other fact necessary to support it. This is a mistake as to the extent to which *res adjudicata* extends in any case, as might easily be shown; but the principle sought to be applied has no application in this case. The registration of a person as a voter conclusively settles nothing, but that he was a qualified voter for the year in which he was registered, and that the fact of his being a voter could not that year be disputed at the polls; but it is utterly valueless even as evidence for any other purpose in this case for reasons we have stated. These registrations were not even admissible as evidence.

"The same reasoning is attempted to be applied to the attempt made to ante-date his naturalization by the order made by the Circuit Court of Randolph. *The order so far as it ante-dates the time when his naturalization is to take effect, so far from being conclusive, was a mere nullity, being an order which no court had any authority to enter.*"

THE CASE OF ALBERT GALLATIN.

His Election as Senator Void, because he had not been a Citizen for the Period required by the Constitution.

Mr. Gallatin was born in Geneva, 1761, and came to the United States in 1780. In the year 1783 he went to Virginia, and in the month of October, 1785, he took the oath of allegiance in that State. In December, 1785, he removed to Pennsylvania, where he purchased land and became a permanent resident. He was elected in 1789 a member of the convention which was called to amend the constitution of the State of Pennsylvania, and subsequently he was for three successive years elected a member of the Pennsylvania Legislature. In February, 1793, he was elected a Senator of Pennsyl-

vania, and he came to the Senate and took his seat in the December following.

It appears from the time he took his oath of allegiance in Virginia, in 1785, to the period of his election as Senator, in 1793, that he had not been a citizen of the United States for the time required by the Constitution, which is nine years.

The committee appointed to investigate the case made their report to the Senate, setting forth the foregoing fact. Upon the coming in of the report of the committee, the resolution was offered in these words (Appendix Con. Globe, Second Session, XXX. Congress, p. 334):

"'*Resolved*, That Albert Gallatin, returned to this House as a member from the State of Pennsylvania, is duly qualified for and elected to a seat in the Senate of the United States.'"

"This resolution was rejected by a vote of fourteen nays to twelve yeas.

"MR. CASS: Will the Senator from Virginia read the names?"

"Mr. Mason read as follows:

"'Those who voted in the affirmative were:

"'Messrs. Bradley, Brown, Burr, Butler, Edwards, Gunn, Jackson, Langdon, Martin, Monroe, Robinson, Taylor—12.

"'The nays were:

"'Messrs. Bradford, Cabot, Ellsworth, Foster, Frelinghuysen, Hawkins, Izard, King, Livermore, Mitchell, Morris, Potts, Strong, Vining—14.

"'A resolution was then offered in these words:

"'*Resolved*, That the *election* of Albert Gallatin to be a Senator of the United States was *void*, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States.

"'A motion was made to divide the question at the word *void;* and

"'On motion to agree to the first paragraph on the motion so divided, it passed in the affirmative: Yeas 14, nays 12.

"'On motion to adopt the resolution, as follows:

"'*Resolved*, That the *election* of Albert Gallatin to be a Senator of the United States *was void*, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States.

"'The vote was: ayes 14, noes 12; and so the resolution was carried.'

"MR. DOUGLAS: I would inquire from the Senator from Virginia whether, in Mr. Gallatin's case, it appeared from the report of the committee that the election *was void* because he had not been nine years a citizen, or because it did not appear that he was a citizen at all?

"MR. MASON: I can only answer by referring to what appeared in the proceedings. The committee reported the facts, as exhibited in evidence before them, and which went that Mr. Gallatin *was of foreign birth.* In the Senate a paper was presented showing the facts as agreed between Mr. Gallatin and the remonstrants, in which paper it was stated that he took the oath of allegiance in Virginia, in October, 1785. How far the Senate was governed by the proof of the date of citizenship, can be gathered only from the conclusion at which they arrived, as it is embodied in the resolution that was adopted. When the case came before the committee, evidence was exhibited on the part of the remonstrants to show that Albert Gallatin was of foreign birth, and then not entitled to a seat in the Senate; that evidence is embodied in the report of the committee. The committee then gave notice to Mr. Gallatin that *it was necessary that he should exhibit evidence on his part;* the resolution adopted by the committee was in these words:

"*Resolved*, That in the opinion of the committee, it is now incumbent on Mr. Gallatin to show that he has become a citizen of the United States, and when."

"Mr. Gallatin replied, if I may so speak, in the nature of a demurrer, that he did not consider that a sufficient case had been made out against him to require evidence on his part, and that he would exhibit none. In that form the case was reported to the Senate. A statement of facts was afterwards submitted to the Senate by Mr. Gallatin, which set forth, among other things, that he had taken the oath of allegiance to the State of Virginia in October, 1785. How far the Senate, in adopting the resolution that was adopted, considered Mr. Gallatin to have become a citizen by virtue of the oath of allegiance, can only be inferred from the tenor of the resolution which contained the sense of the Senate on the case as it stood.

"The resolution stated that his *election was void*, he

not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States. The construction which I should give to the resolution is, that by the oath of allegiance, Mr. Gallatin having become a citizen of the State of Virginia before the adoption of the Constitution of the United States, and removing afterwards to Pennsylvania, he became entitled by the Constitution, when it was adopted, to the same rights and privileges which he had enjoyed in Virginia—one of which was that of citizenship. In other words, that when he removed from Virginia to Pennsylvania he carried his citizenship with him. The expression in the resolution is not that he was not eligible to a seat in the Senate because of not being a citizen, but because he had not been a citizen of the United States the regular term of years required by the Constitution."

Further reference will be hereafter made in another connection to Mr. Gallatin's case.

THE CASE OF GENERAL SHIELDS.

His Election as Senator Void, he not having the required Citizenship at the Commencement of his Term.

General Shields was elected a United States Senator from the State of Illinois on the 13th day of January, 1849. He was an alien by birth. He was naturalized in the Circuit Court of Effingham County on the 21st of October, 1840. He took his seat as United States Senator on the 4th of March, 1849, when his seat was contested upon the ground that he had not been a citizen of the United States the term of nine years required as a qualification to be a Senator of the United States. He had resided in the State of Illinois seventeen years.

He had held a number of public offices. He had been a member of the Legislature, which required naturalization. He had held the office of Auditor of Public Accounts, which required naturalization. He had been a Judge of the Supreme Court of Illinois, which required naturalization. He had been Commissioner of the General Land Office. He had been a General in the United States army, and lastly had been elected United States Senator.

The report of the Senate Committee of the ineligibility of Gen. Shields as a Senator from Illinois, composed of Senators Benton, Felch, Mason, Webster and Pearce, made on the 13th day of March, 1849 (page 322, Appendix Con. Globe, XXX. Congress, Second Session), was as follows:

"The secretary read the report and resolution as follows:

"The select committee to which was referred the certificate of election of the Hon. James Shields to a seat in this body, with instructions to inquire into the eligibility of the said James Shields to such seat, report:

"That having given due notice to the said James Shields, he appeared before them, and they took the subject into consideration. They further report that the said certificate of election declares that the said James Shields was chosen a Senator of the United States by the Legislature of the State of Illinois on the 13th day of January last; and that it further appears, and is admitted by the said James Shields, that he is an alien by birth, and the only proof before the committee of the naturalization of the said James Shields in the United States is contained in a copy of a certificate of naturalization in the Circuit Court of Effingham County, in the said State of Illinois, which is annexed to and made part of this report, by which certificate it appears that the said James Shields was admitted by said Court a citizen of the United States on the 21st day of October, 1840.

"*Resolved*, That the election of James Shields to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States."

In General Shields' case it was said:

SENATOR CALHOUN: "That he is not a Senator is clear, because he cannot perform one duty belonging to the senatorial office."

SENATOR WEBSTER: "If the election was void, a vacancy cannot be created by resignation—there is a vacancy already."

SENATOR BERRIEN: "If this election was void, the office has never been filled since the expiration of the last Senatorial term. * * * The party could not give up an office which he had never filled."

SENATOR BUTLER: "It cannot be maintained that he ever held a valid title to his seat at all. * * * You cannot say that any title had been conferred on him at all."

SENATOR BADGER: "General Shields was never for a moment rightfully a member of this body. * * * I assert that that color of right is no right at all."

SENATOR MASON: "It was void *ab initio*."

SENATOR DAWSON: "What is the result? Why, that his election, of course, was void. * * * The election cannot give him those qualifications."

The seat is vacant "by failure of the Legislature to elect a Senator possessing the requisite qualifications."

SENATOR FOTTE: "Does the Senator mean to express the opinion that General Shields has never been a Senator here?"

SENATOR DAWSON: "I do most decidedly. * * * If we cannot make a Senator contrary to the Constitution, he, of course, never was a Senator."

At the end of the debate, the following resolution was adopted without a division.

"RESOLVED, That the election of James Shields to be a Senator of the United States was void, he not having been a citizen of the United States the term of years required as a qualification to be a Senator of the United States at the commencement of the term for which he was elected."

The Doctrine of Relation Back is not Applicable.

THE NATURALIZATION OF JOSEPH BOYD IN 1890 BEARS NO SUCH RELATION TO THE TAKING OUT OF THE FIRST PAPERS BY THE SAID JOSEPH BOYD IN 1849 AS TO MAKE EITHER JOSEPH BOYD OR JAMES E. BOYD, HIS SON, CITIZENS OF THE UNITED STATES FROM 1849. THE DOCTRINE OF RELATION DOES NOT APPLY TO THIS CASE.

The declaration of intention to become a citizen is an entirely different thing, as provided for in the first subdivision of Section 2165, Rev. Stats., quoted *infra* (see Appendix), from the admission to citizenship provided for in subdivisions second and third of said Section 2165. It will be observed that under the first subdivision the applicant declares on oath that it is *bona fide* his intention to become a citizen of the United States. It will be observed further that this oath must be taken "two years at least prior to his admission." This is a specfic provision that he cannot become a citizen until two years after such declaration is made. To say that the doctrine of relation applies to such cases would do away with the force and effect of the phrase last above quoted. By the second and third subdivisions of the section it will be seen that the oath taken by the party when admitted to citizenship is an entirely different oath from the one taken under the first subdivision. Under the second subdivision the applicant makes oath "that he will support the Constitution of the United States and that he absolutely and entirely renounces and abjures all allegiance and fidelity

to every foreign prince," etc. It will be observed that this is the first time that the applicant takes an oath to support the Constitution of the United States; it is the first time the applicant takes an oath abjuring all allegiance and fidelity to every foreign Prince, etc. By the third subdivision it appears that there must be proof made of the good moral character of the applicant and that he is attached to the principles of the Constitution of the United States. There are many things which take place when a person becomes naturalized which have no connection whatever with his declaration of intention to become a citizen.

Prior to 1890 Joseph Boyd, the father, had never taken an oath abjuring his allegiance to Great Britain and Ireland. Prior to 1890 Joseph Boyd had never taken an oath to support the Constitution of the United States as contemplated in the naturalization laws. To say that James E. Boyd, the son, is a citizen under these circumstances is nothing more or less than saying that Joseph Boyd, who was made a citizen in 1890, has been a citizen of the United States since 1849. To apply to this case the doctrine of relation is not only contrary to the spirit and the provisions of the Act of Congress, but it is interpolating into the Act of Congress a provision which the Congress of the United States studiously avoided inserting therein.

THIS QUESTION WAS CONSIDERED AND DECIDED in Dryden vs. Swinburne, 20 W. Va., 134, where the Court in speaking of this subject said:

"Another position taken is, that the naturalization of Ralph Swinburne in 1866 *related back to 1852*, when he made his declaration, and he is therefore to be now considered as a citizen from that date. *No authority* is cited to sustain this *novel* position except a number of

cases on entirely distinct subjects, in which, for reasons applicable to such cases, the law permits in certain cases a relation back. Thus an office found, when returned, relates back and vests title in commonwealth from the finding. So the appointment of an administrator for certain purpose relates back to the death of the testator. A patent when issued relates back to the entry; and sale, when confirmed by a court of equity, relates back to the time of the sale. The astute counsel could have found, no doubt, many other cases where the law allows such relation back, sometimes for all purposes and at other times for certain purposes only. *On the other hand, innumerable cases might be cited where there is no such relation back.* Each case of this character is based on reasons applicable to it especially, BUT WHAT POSSIBLE BEARING THEY, OR THE REASONS ON WHICH THEY ARE BASED, HAVE UPON THE PRESENT CASE I CONFESS I AM UNABLE TO PERCEIVE."

CASE OF DESTY.

Held, that Court could not make nunc pro tunc certificate or receive parol evidence of naturalization.

In re Robert Desty, 8 Abbott's New Cases, 250, while not directly deciding this point, quite clearly shows that the parties and Court did not entertain a notion that naturalization could relate back to the time of declaration of intention. Robert Desty, the well-known legal author and annotator of San Francisco was born in Canada in 1827. In 1837 he came to New York, intending to remain in the United States. He remained in New York until 1849. He served in the United States army in the Mexican War. He claimed that he had taken out naturalization papers in the City of New York in November, 1849. There was no record, however, to the effect that he had been naturalized at that

time. The records only disclose a declaration of intention to become a citizen of the United States.

In December, 1849, Robert Desty went to California. After his arrival in California, he exercised the rights of citizenship. He was a member of the bar of California ; he had held public office. He was elected a Senator from the City of San Francisco. He was prevented from taking his seat as such Senator, because objection was made to his citizenship. Thereupon he returned to New York and made application to the Superior Court to have a record of his naturalization entered as of the date of November 28, 1849, and a certificate of naturalization to be issued to him *nunc pro tunc*. The Court refused to make the order as prayed for two reasons : First, the Court had no authority to make any such order ; second, that no such parol evidence of citizenship would be admissible to prove that Robert Desty had in fact been naturalized in 1849 ; that the Court records were the only evidence of naturalization, and the records only disclosed the filing of a declaration of intention in 1849, and did not disclose the fact that any naturalization had taken place at that time.

If either Robert Desty or his counsel or the Court had been of the opinion that naturalization would relate back to the declaration of intention, there would have been no occasion for this hearing before the Court for this order *nunc pro tunc*, as the same thing in effect would have been accomplished by the naturalization of Robert Desty in California in 1880, which was the time of this hearing. This case is therefore a strong inferential argument, at least, that the doctrine of relation cannot be applied to this kind of a case.

Cases to the Effect that Naturalization does not Retroact.

In Priest vs. Cummings, 20 Johnson, 354, Senator Verplanck said :

"The legal effect of denization in England is not retroactive, as we have above seen. This is evidently not an arbitrary distinction, but grows out of the natural interpretation of the language used. There is nothing in the word 'denizen' that has any relation to any specified time, especially to the time of birth. Denization is a new privilege conferred upon the alien, but not having, like the phrase 'natural born or native' any relation to the fact of birth or to its time, operates only from the date of its reception. Now, the language of our Acts of Congress of general naturalization differs from the special English acts in precisely the same manner, must be controlled by the same rules of legal interpretation and, of course, are governed by the same distinction. They are called naturalization acts, but there are no words used putting the new citizen on the same footing as if he had been born in the United States. The operative words are, that on complying with certain conditions the applicant '*shall be admitted a citizen* '*of the United States*,' or '*admitted to citizenship*,' or '*shall be admitted to become a citizen.*' The words '*admitted*,' '*become*' and '*shall be admitted to become*,' involve a *future signification;* nor is there anything implied in the word 'citizen' more than in that of 'denizen,' having relation back to the time of birth. I cannot, therefore, but consider all the English authorities *denying retrospective* operation to Acts of Parliament admitting to denization, as applying to and authorizing a similar interpretation of our Acts of Congress 'admitting aliens, on complying with certain con-'ditions, to become citizens.' Even independently of any authority bearing on this subject, the obvious interpretation of language leads me to the same conclusion, that the legal rights of the alien born, admitted to American citizenship, like those of the British denizen, *bears date only from his political* and not from his natural birth."

In the case of Heney vs. Brooklyn Benevolent Society, 39 N. Y., 333, the Court said:

"At the time of the death of Cornelius Heney, who died seized of the premises in question, the plaintiffs were aliens. It is not claimed that, as such, they could inherit and hold lands in this State. The claim of the appellants is, that having become naturalized citizens of the United States after the decease of the said Cornelius, they became entitled to take and hold the real estate whereof he dies seized. This is claimed upon two grounds, viz.: first, that upon the general principles *naturalization has a retroactive operation* which vested or confirmed in them the estate which, but for their alienation, would have descended to them in fee at the death of Cornelius Heney, had they then been citizens of the United States; second, that the statute of this State, passed April 10, 1843, entitled, 'An Act to enable resident aliens to hold and convey real estate,' entitled them to take and hold the land as heirs at law of the person last seized.

"The first point involves this general result, viz.: That, whenever the owner of the real estate dies without heirs capable of inheriting, the State holds the title by escheat, subject to the contingency that, at some future day, some person or persons now aliens, but otherwise entitled to inherit, and, by becoming naturalized, divest the title to the State. *Certainly, there is no common law rule or authority for such a proposition*, for naturalization is not of the common law. The English law writers who speak of the retroactive effect of naturalization, therefore, speak of the express or constructive effect of the Acts of Parliament, by which, in special cases, the disability of alienism is removed, in terms which are deemed to involve the installation of the subject in the same condition in the eye of the law as if he were native born."

"It is clear, I think, that we are to speak for the legal effect of naturalization in the statutes by which it is authorized, and in such legislation as had been had in our own State on the subject. It is not to be determined upon a mere definition of the term 'naturalization.' But, if it were, it would be most logical and most consistent with sound principle to say that the subject, when naturalized, began to have capacities per-

taining to citizenship available *for the future, and only in such future.* If it were conceded that the Congress of the United States have power to declare the effect of naturalization, so as to give the subject thereof all the rights retroactively as well as prospectively which he would have or would have had if native born, of which, in respect to real estate within the State, the transfer, transmission and descent of which is peculiarly matter of State policy, there is great room for doubt. *I think it clear that the naturalization laws of the United States admit of no such construction.*

"Under those laws the applicant is admitted to citizenship upon complying with certain prescribed conditions. He '*becomes*' a citizen. He is put in a condition or acquires a character in which he can have and enjoy all the rights and privileges which, by law, pertain to citizenship, and that is all. But all this is, according to the plain reading of the laws, *prospective.* His capacity *then* begins to be useful or efficient to enable him to have and enjoy whatever pertains to his new character."

THE FACT THAT JAMES E. BOYD WAS AN INHABITANT OF THE TERRITORY OF NEBRASKA AT THE TIME WHEN NEBRASKA WAS ADMITTED INTO THE UNION AS A STATE DID NOT HAVE THE EFFECT OF MAKING HIM (HE THEN BEING AN ALIEN) A CITIZEN OF THE UNITED STATES.

The Nebraska Enabling Act, approved April 19th, 1864, provides in Section 5 "that whenever a constitution shall be formed by the people of the Territory of Nebraska in compliance with the provisions of the act it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the

original States, without any further action whatever on the part of Congress" (see Appendix hereto, where the Enabling Act is reprinted).

On the 9th day of February, 1867, Congress passed an act entitled "*An Act for the admission of Nebraska into the Union*," in which is found the following:

"Be it enacted that the Constitution and State Government which the people of Nebraska have formed for themselves be and the same is hereby accepted, ratified and confirmed, and that the said State of Nebraska shall be and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States in all respects whatsoever" (see Appendix).

Section 3 of the act last above referred to provides that said act shall not take effect except upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise to any person on account of race or color, and upon the further fundamental condition that the Legislature of said State shall by solemn public act declare its assent to the above fundamental conditions, and when so done the President should by proclamation announce the fact, whereupon the admission of the State into the Union should be considered completed.

On the first day of March, 1867, the President did issue his proclamation reciting a compliance with the foregoing provisions, which proclamation concluded as follows:

"Now, therefore, I, Andrew Johnson, President of the United States of America, do, in accordance with the provisions of the Act of Congress last herein named, declare and proclaim the fact that the fundamental con-

ditions imposed by Congress on the State of Nebraska to entitle that State to admission to the Union have been ratified and accepted, and that the admission of the said State into the Union is now complete."

The question for consideration is whether the admission of Nebraska as a State into the Union, on an equal footing with the original States, as provided in the Enabling Act and the Act of 1867, made all inhabitants thereof including aliens ipso facto citizens of the United States.

Similar or the same language is found in the enabling acts by which the various Territories were authorized to form State governments in order to be admitted into the Union of States.

It will be observed by an examination of the Enabling Act of Nebraska, as also of various other enabling acts, that it contains *no provision touching the rights, privileges and immunities of the inhabitants*, upon the State coming into the Union. The silence of the enabling acts on this subject is here very important. The inhabitants of these Territories were living within the *jurisdiction* of the United States, were *subject to the jurisdiction* of the United States, and were *already citizens of the United States*, except such as were aliens. Those inhabitants who were citizens of the United States were *none the less citizens* by reason of the fact that they were inhabitants of the Territories.

Citizens of the United States do not lose their citizenship by changing their residence from a State to a Territory. Citizens of the United States residing in the District of Columbia and in the Territories are such citizens to the *same extent* that they would be if residing in one *of the States* (Prentiss vs. Brennan, 2 Blatchf., 164; Picquitt vs. Swan, 5 Mason, 54).

It would not be unfair to state that about as large a relative proportion of the inhabitants of the Territory were citizens of the United States as of the inhabitants of any of the States of the Union. There was no *occasion*, therefore, for Congress to intend the admission of the State into the Union as an act of *collective* naturalization. There was no more urgency or necessity for such a collective act of naturalization for this Territory than there would be to pass a collective act of naturalization for aliens residing within a State. If Congress had ever intended the admission of States into the Union, formed under the various enabling acts to operate as a naturalization of all aliens residing therein, *it would doubtless have been so provided* in the act itself, *in unmistakable terms.*

The subject of naturalization was conferred upon Congress by the Constitution of the United States, and Congress has passed many acts upon the subject. These Acts declare and establish the fixed policy of the Government on the subject of admitting aliens to become citizens. If it was intended by Congress to extend the right of naturalization of aliens by the enabling acts *outside of and beyond the various Acts of Congress* upon that subject it would have *so provided in the Enabling Act.* Applying the accepted rules of statutory construction, it cannot be held that the Enabling Act was intended to relate to naturalization, either individually or collectively, and in contravention of the naturalization laws of the United States without it being so specifically stated in the Enabling Act.

Collective naturalization resulting from treaty or cession is where the United States takes to itself the

whole or a part of an independent government. For an illustration of this we may refer to the Treaty of Paris, by which we acquired Louisiana; to the Treaty of Spain, by which we acquired Florida, and the Treaty of Guadalupe Hidalgo, by which we acquired California, and the resolution by which the Republic of Texas was admitted into the Union.

This principle is founded on a moral and political necessity, otherwise the inhabitants of the Territory thus acquired would be left without the rights of citizenship in any country. THIS PRINCIPLE *cannot, however, be applied* to Nebraska, for the reason that the Territory of Nebraska, as well as the inhabitants thereof, *was already within the jurisdiction* of the United States, and subject to the general Government.

This conclusion is made more clear by reference to the language of the Enabling Act. It provides that the State shall be admitted into the Union on an *equal footing* with the original States. It was the *State* which was admitted into the Union. Land, personal property and the inhabitants were *already* within the dominion and jurisdiction of the Federal Government. The State in its organized and sovereign capacity was a new creation. It was this *State*, thus *newly created* in its *sovereign capacity*, which was admitted into the Union. It may be said that the inhabitants make the State, *nevertheless the State in its political organization is entirely distinct from the individuals who may be residing therein.*

The words "equal footing with the original States" may be fairly construed to have no reference to the status of the inhabitants. The word "*footing*" is de-

fined "*firm position*," "*established place*," "*relative condition*." We must look to the Constitution of the United States to find out what is the "*firm position*," "*established place, and relative position*" *of the various States*. The rights of the States thus referred to are defined in the Constitution, such as *having representation in the respective Houses of Congress*, and other relative rights, more particularly described in Article 4 of the Constitution. The *position and relative rights of the States set forth* and defined in the Constitution of the United States, which were possessed by the original States by virtue of the adoption of the Constitution, were what were intended to be acquired by Nebraska under the Enabling Act.

If the Enabling Act is to be construed as fixing the status of the inhabitants, *why have it relate to citizenship* any more than to *property rights*, or *personal rights?* If it was intended to fix the status of the inhabitants to be in all respects the same as was the status of the inhabitants of the original thirteen States, then we are led into interminable difficulties, by reason of the fact that these *rights are different in different States*. The personal rights of the inhabitants of the original States with reference to the elective franchise are collected and stated in the opinion of this Court in Minor vs. Happersett, 21 Wall., 172. It will be observed that they were not alike in any two of the original States. It may be stated, however, that the inhabitants of the original States became *ipso facto* citizens of the United States. The reason therefor was that the people of the original States were persons who associated themselves together to form a nation, and consequently were its original citizens. This is so stated in Minor vs. Hap-

persett, *supra* (see Appendix for extracts from the opinion in this case).

The inhabitants of Nebraska were not creating a new and independent government by the adoption of a State Constitution, and were not thereby throwing off their allegiance to any foreign power. The principle which fixed the status of the inhabitants of the original States can have no application in this case.

The language of the Enabling Act has no reference to the status of the inhabitants of the original States when they came into the Union, any more than it can be said to have reference to the footing or relative rights of the original States at the time when they formed the Union of States.

It is self-evident that no Territory can now be admitted into the Union as a State with all the rights and privileges which were possessed by the original States when they came into the Union.

This may be forcibly illustrated by reference to the Fourteenth Amendment to the Constitution of the United States, which, since its adoption, *forbids* the States from exercising powers and privileges which they could have exercised at the time when the original States came into the Union. It is no answer to this illustration to say that Nebraska was admitted into the Union before the adoption of the Fourteenth Amendment, because we find the same language in the enabling acts by which new States have been admitted into the Union since the adoption of that amendment. We think it clear, both from the Enabling Act and from

constitutional and political history, that the provisions of the Enabling Act by which Nebraska was admitted into the Union on an equal footing with the original States must be *used in the present tense*—that is to say, was admitted into the Union with the same relative rights which the original States held under the Constitution *at the date when Nebraska was admitted.* If this view be correct, the words "equal footing" could not be construed as *naturalizing all aliens* who were then inhabitants of the State, for the reason that the aliens residing at that time within the limits of the original *States were not citizens of the United States.*

Let us look at the evils which must result from a practical point of view if it were held that the admission of a State naturalizes all aliens who were inhabitants of the Territory. If this be a true construction, all that need be done by newly arrived immigrants to be transferred from aliens into citizens would be to take up their abode in a Territory prior to its admission as a State into the Union. Congress foresaw the danger attendant upon the naturalization of aliens before they had acquired a knowledge of the Constitution and laws of our country, and consequently required a residence for a period of years, and, in addition to that, proof should be given before the proper Court that they are of good moral character and attached to the principles and Constitution of the United States before they should be admitted into citizenship. This uniform and established policy of our Government would be entirely overthrown by the holding that aliens become citizens by the mere admission of a State. This would preclude all inquiry into the various questions made necessary by Congress in wise naturalization laws. This rule of construction

would have made the Chinese residing in Wyoming, Idaho and Washington citizens of the United States, while Congress has uniformly held that the Chinese were not proper subjects for naturalization under our present laws.

If we were to give to the admission of Nebraska as a State into the Union, the force and effect of treaty or cession between the United States and the Territory of Nebraska, it could not control the present case, or the citizenship of the respondent, *for the reason that he was born in Ireland of alien parents*, and *was a subject of the Queen of Great Britain and Ireland* at the time of the admission of Nebraska as a State into the Union, and his political relationship to this foreign power could not be made the subject of any *compact between Nebraska and the United States* to which *Great Britain was not a party.*

Judicial Decisions relating to the Subject.

The view which we have expressed to the effect that the inhabitants of the Territory did not become citizens of the United States by the admission of such Territory as a State into the Union, is expressly held to be sound in The State vs. Primrose, 3 Ala., 546. This case is referred to in the opinion of the Supreme Court of Nebraska (see Record). We are aware of two earlier cases in Louisiana which seem to announce a contrary view, but we cannot accept them as applicable as the circumstances and legislative provisions were essentially different. This will appear by a comparison of the legislative provisions involved in the

Louisiana cases with those which relate to Nebraska and which we shall presently point out.

It is a matter of common knowledge that aliens residing in the Territory of Nebraska, who had declared their intention to become citizens of the United States, completed their naturalization after the State was admitted into the Union, and the same practice has uniformly prevailed in other States, so far as our knowledge prevails. All this would have been unnecessary if the admission of the State into the Union had the effect to complete the naturalization of aliens. We regard this general, universal understanding, lay, professional and judicial, and the practice based upon it, as the very strongest evidence that the position that the admission of the State effected a wholesale naturalization is unsound.

The opinion of the Court in McKay vs. Campbell, 2 Saw., 125, sustains our view. McKay was born an alien. He was an inhabitant of Oregon at the time that the Territory was admitted as a State into the Union, and afterwards claimed to be a citizen of the United States. The Court held that he could not claim citizenship except through naturalization, and further held that the Treaty of 1846 did not make him a citizen of the United States, and that there was nothing in that treaty to operate as a naturalization of the inhabitants.

The last phrase of the section in the Nebraska Enabling Act on which the claim of the respondent is made, reads: "Whereupon it shall be the duty of the President to issue his proclamation declaring the State admitted into the Union *on an equal footing with the original States.*" This language relates

simply to the State in its sovereign, governmental capacity. It refers simply to the relation which the State would sustain to the Union. What the rights of the State are as a component part of the Union are defined and provided for in the Constitution of the United States. This sentence had no reference to the rights, privileges and immunities of individual inhabitants. It had nothing, therefore, to do with citizenship. This construction is sustained by the proclamation of the President under date of March 1st, 1867, which simply proclaimed that the Territory has complied with the Enabling Act and the Act of 1867, and that the admission of the said State into the Union is now complete.

THE ORGANIC ACT, THE TERRITORIAL LEGISLATION, THE ENABLING ACT, AND STATE CONSTITUTION, AS WELL AS THE PRESENT CONSTITUTION AND LAWS OF THE STATE OF NEBRASKA, ALL RECOGNIZE THE DISTINCTION BETWEEN CITIZENS AND ALIENS AS HEREAFTER MORE FULLY APPEARS.

JAMES E. BOYD WAS NOT ENTITLED TO PARTICIPATE IN THE TERRITORIAL GOVERNMENT, OR IN THE FORMATION OF A STATE GOVERNMENT FOR NEBRASKA, AND WAS AT NO TIME A QUALIFED ELECTOR THEREIN.

The Organic Act Disqualified Boyd.

The act to organize the Territories of Nebraska and Kansas was approved May 30th, 1854, the same being Chapter 59 of the First Session of XXXIII. Congress (see Vol. X., United States Stats. at Large, p. 277—see

Appendix hereto). By the Fourth Section of this act Congress provided for a Legislature for the Territory, and enacted :

"That the legislative power and authority of said Territory shall be vested in the Governor and a Legislative Assembly. The Legislative Assembly shall consist of a Council and House of Representatives. The Council shall consist of thirteen members, *having the qualifications of voters as hereinafter prescribed*, whose term of service shall continue two years. The House of Representatives shall, at its first session, consist of twenty-six members *possessing the same qualifications as prescribed for members of the Council*, and whose term of service shall continue one year. The number of Representatives may be increased by the Legislative Assembly from time to time *in proportion to the increase* of *qualified voters*, provided the whole number shall never exceed thirty-nine."

By Section 5 of the Organic Act Congress determined who should have the *right of suffrage and of holding office*, namely :

SECTION 5. "*And be it further enacted* that every free white male inhabitant, above the age of twenty-one years, who shall be an actual resident of said Territory *and shall possess the qualifications hereinafter prescribed*, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory ; but the qualifications of voters and of holding office at all subsequent elections shall be such as shall be prescribed by the Legislative Assembly : *Provided* that the *right of suffrage* and of *holding office* shall be exercised *only by citizens of the United States* and *those who shall have declared on oath their intention to become such*, and shall have taken an oath to support the Constitution of the United States and the provisions of this act."

It will be noticed by the Organic Act that, while Congress was desirous of permitting *people* of the Territory to govern themselves and to fix the *qualifications of voters* and determine *who might hold office*, it took

especial care to provide that *none should be permitted to vote* and *hold office under the Territorial Government*, except such as were *citizens of the United States* and those who had declared their intention to become such, as well as those who were free, white male persons over twenty-one years of age. The term people was used in this restricted sense, and the Territorial Legislature in the future was bound to restrict the right to vote within this limit; it could not enlarge the limit thus fixed by the Organic Act. The result is plain, namely, that inasmuch as James E. Boyd was born an alien and had not declared his intention to become a citizen of the United States, he was forbidden by the Organic Act to vote or hold office under the Territorial Government of Nebraska. He was likewise thus forbidden by the legislation of the Territory as we next show.

The Territorial Legislation Disqualified Boyd to Vote or Hold Office.

The Acting Governor of the Territory of Nebraska issued a proclamation on the 23d day of November 1854, prescribing the rules for conducting the first election to be held under the Organic Act (see Appendix No. 4).

Rule 7 provided for the challenging of unqualified voters.

Rule 8 provided that when a person is so challenged he shall be permitted to vote upon taking an oath as follows:

"You do solemnly swear that you *are a citizen of the United States;* that you are a resident of this precinct;

that you are twenty-one years of age, as you verily believe; that you intend to be a permanent resident of Nebraska Territory, and that you have not voted at this election."

It will be observed under this rule that *only citizens of the United States were entitled to vote.* Persons who simply declared their intention to become citizens were excluded.

The first session of the Territorial Legislature passed an act entitled "*An act regulating elections*" (see Appendix No. 5), approved March 16, 1855. That act defined electors as follows:

"SECTION 10. Every free, *white male citizen of the United States*, who has attained the age of twenty-one years, shall be entitled to vote in the precinct where he resides." * * *

It was provided in Section 11 of said act that if an elector was challenged he should take an oath as follows:

"*I, A. B., do solemnly swear that I am a citizen of the United States.*" * * *

It will be observed that this act limited the elective franchise to citizens of the United States.

Penalty for Illegal Voting. It was provided in the Criminal Code of March 15th, 1855 (see Appendix, No. 6), by Section 131, that if any person should wilfully vote when "*he is not a citizen of the United States*" he shall be fined in a sum not exceeding three hundred dollars, or imprisoned not exceeding one year.

In the succeeding year (1856) the Legislature passed an act relating to elections, approved January 26, 1856

(see Appendix No. 7), in which it was provided, in Section 10: "Every free, white male *citizen of the United States who has attained the age of twenty-one years, and those who shall have declared on oath their intention to become such,*" shall be entitled to vote.

Section 11 of the same act provided for the challenged elector to take an oath to the effect that he was a citizen of the United States, or had declared his intention to become such.

COMMENT. It will be observed that this act extended the elective franchise to those who had declared their intention to become citizens of the United States.

Under the Organic Act the right to hold any office of trust or profit was extended to :

(1) Citizens of the United States ;

(2) Those who had declared their intention to become citizens of the United States.

The Territorial Legislature by an act, approved January 26, 1856, limited this right to hold office to citizens of the United States.

SECTION 4. "*Neither shall any person be entitled to hold any office of trust or profit in this Territory unless he be a free, white, male citizen of the United States, and over the age of twenty-one years*" (see Appendix No. 7).

It will be observed that the Territorial Law of 1855, providing that none but citizens of the United States should vote, was subsequently modified so as to allow such as had declared their intention to become citizens of the United States to vote. The law of 1856, which permitted none to hold office except such as were *citizens of the United States,* was never modified prior to the admission of the Territory as a State into the

Union. All subsequent legislation of the Legislature of the Territory of Nebraska relating to elections will be found in the appendix hereto.

Suffice it here to state that the law hereinbefore referred to, confining the right to hold any office of trust or profit to citizens of the United States, was not modified. The various acts relating to elections limited the right to vote to citizens of the United States and to those who had declared their intention to become such.

CONCLUSION. It follows that at the date of the passage of the Enabling Act, and at all times prior thereto, James E. Boyd was not entitled either to vote or to hold office of profit or trust in the Territory of Nebraska.

Boyd was not Qualified either to Vote or to Hold Office under the Provisions of the Enabling Act.

We now come to the Enabling Act. Here we find no purpose on the part of Congress to allow persons to vote or hold office, other than such as the Territory itself had by law provided might do so, within the limits or restrictions of the Organic Act. The whole of the Enabling Act must, of course, be read together (see Appendix No. 8).

Section 1 provides:

"That the *inhabitants* of that portion of the Territory of Nebraska included in the boundaries * * * designated be, and they are hereby, authorized to form for themselves a Constitution and State Government with the name aforesaid, which State, when so formed, shall be admitted into the Union as hereinafter provided."

It is plain that all the inhabitants could not have a hand in the formation of such Constitution, for, by Section 3 of the same act, it was provided:

"That all persons *qualified by law to vote* for Representatives to the General Assembly of said Territory *should be qualified to be elected* (to the Constitutional Convention); and *they* are hereby authorized *to vote* for and choose Representatives to form a convention," &c.

So the word *inhabitants* in the First Section was restricted to mean *qualified voters* by the Third Section.

Section 5 provided also:

"That in case a constitution and State government should be formed," * * * "the convention forming the same should provide for submitting such constitution to *the people* of said Territory for their ratification or rejection at an election," &c., * * * "at which election the *qualified voters*, as hereinbefore provided, shall vote directly for or against the proposed constitution," &c.

So the word *people* in this section also was restricted to mean *qualified voters.*

Clearly it was manifest that the "*inhabitants*" and the "*people*" who could do these things were only the *qualified voters*, and Congress in the Enabling Act meant no more. *And these in every instance must either be citizens of the United States or those who had declared their intention to become such. And as Congress in the Organic Act had permitted only citizens of the the United States and those who had declared their intention to become such* to vote and hold office, and by the limitation or restriction therein, had *prohibited* the Territorial Legislature from ever empowering *any except citizens of the United States, or those who had declared their intention to become such, ever to vote or hold*

office in the Territory, we must turn to this Organic Act to see what Congress meant when it said in Sections 3 and 5 of the Enabling Act that the *qualified voters only should vote for members of the Constitutional Convention, and to ratify or reject the proposed Constitution.* And why was Congress talking about and referring to *citizens of the United States and those who had declared their intention to become such*, and limiting the right to vote and hold office to these only in the Organic Act, and in the Enabling Act, if it intended, by the act of admission of the Territory into the Union as a State, to throw down all such barriers, and by that act of admission naturalize, *en masse*, as in the twinkling of an eye, every alien therein ?

If we now turn to Section 13 of the Enabling Act we shall get further light as to the intention of Congress in this respect. This section reads :

"That from and after the admission of the said State of Nebraska into the Union, in pursuance of this act, the laws of the United States, not locally inapplicable, shall have the *same force and effect within the said State as elsewhere* within the United States."

It is plain when Congress provided by the Organic Act and by the Enabling Act that none but citizens of the United States and those who had declared their intention to become such should vote or hold office that Congress recognized that there were, or might be, some *aliens*—free white *aliens*—above the age of twenty-one years, in the Territory ; else why bar such from voting and holding office ? It is clear, too, *up to the time of the* admission of Nebraska into the Union *aliens* could not vote, nor could they hold office in the Territory. It is clear, too, by the provision of Section 13 of the

Enabling Act, just quoted, that Congress provided that *from and after* the admission of the said State of Nebraska into the Union in pursuance of the Enabling Act, all the laws of the United States not locally inapplicable, such as the laws in relation to naturalization, post-offices and post-roads, carriage of money, bankruptcies, banking and the like, should be applicable and have the same force and effect within the said State as elsewhere.

Why should Congress have kept all *aliens* from voting and holding office in the Territory *before* it was admitted as a State, and then upon and by the act of its admission make *en masse* all such *aliens* citizens and also and then provide that every alien who should, *after that hour*, come to the Territory, should be naturalized before he should enjoy the privileges of a citizen ?

This entire course of legislation in respect of Nebraska distinguishes this case from the two cases in Martin's Louisiana reports, referred to in the dissenting opinion in the Court below.

Difference between Language of the Treaty of Paris and of the Enabling Act.

Before we leave this subject we should call attention to the difference in the phraseology of the third section of the Treaty of 1803, by which Louisiana was acquired, and the closing words of Section 5 of the Nebraska Enabling Act.

The third section of the Treaty of Paris of 1803 speaks solely of the "*inhabitants*" of the ceded Territory. It says the "*inhabitants*" *shall be incorporated*, * * * and *admitted* as soon as possible * * *

to the enjoyment of all the rights, advantages and immunities of *citizens of the United States*, and in the meantime, &c. (see appendix (No. 2) for text of this section of the treaty). Neither the circumstances nor the language make the case analogous or similar to the Nebraska case.

The Nebraska Enabling Act empowers only the inhatants who are qualified voters, free, white male inhabitants above the age of twenty-one years, who are already citizens of the United States, or have declared their intention to become such, to prepare a constitution; and provides that this constitution shall be preliminary to the admission of the *State* into the Union, not preliminary to the admission of the inhabitants to citizenship of the United States.

The closing paragraph of Section 5 of the Enabling Act, referring to the former language of the same section which relates to the adoption or rejection of the Constitution by the qualified voters, which closing paragraph assumes that the Constitution has been adopted, says: "Whereupon it shall be the duty of the "President of the United States to issue his proclama-"tion declaring *the State* admitted into the Union on "an equal footing with the original States;" *i. e.*, the new State from that time stands in line with every other State in the Union, with all the privileges and under all the burdens of a State government. No mention is made of the inhabitants; no statement is made that the inhabitants are admitted to citizenship as in the Treaty of Paris. No foreigners or aliens are adopted, nor are any made citizens of the United States.

All the inhabitants of the Territory who were aliens

when the same was made a State remained aliens; and no privileges were accorded them that they would not have enjoyed before had they removed from the Territory to a State already admitted.

In Nebraska, as a State of the Union, they had such privileges as the aliens residing in other States had, and none other. By the admission of Nebraska as a State into the Union, a State government was brought to all the inhabitants of what was before a Territory. Those who were aliens before remained aliens the same as if they had removed from the Territory into a State years before admitted into the Union. In the one case the State was brought to the inhabitants; in the other it would be the inhabitants going to a State government. But in neither would the relation of the inhabitants to the United States Government so far as their alienage or citizenship was concerned be changed. To become a citizen of the United States they must comply with the Federal laws in relation thereto.

The Constitution of Nebraska and subsequent Legislation continued the Same Restriction.

THE CONSTITUTION OF NEBRASKA, approved February 9th, 1866, which was the Constitution in force when Nebraska was admitted into the Union as a State, in Article II., Section 2, provided:

"Every male person of the age of twenty-one years, or upwards, belonging to either of the following classes, who shall have resided in the State, county, precinct and ward for the time provided by law, shall be an elector.

"FIRST. White citizens of the United States.

"SECOND. White persons of foreign birth who shall have declared their intention to become citizens conformable to the laws of the United States on the subject of naturalization."

It will be observed that this provision of the Constitution recognized *citizens* and *aliens;* it required *that aliens should either be naturalized or should have declared their intention to become citizens before* they could be permitted to exercise the elective franchise. It was the same discrimination which was found running through all the territorial legislation upon this subject.

This distinction between citizens and aliens is at war with the suggestion that all the inhabitants of Nebraska were citizens of Nebraska and made *ipso facto* citizens of the United States by the admission of the State into the Union.

REVISED STATUTES OF NEBRASKA. In 1866 the Territorial Legislature revised the Statutes of Nebraska, and in Section 33, Chapter 17, defined electors as follows:

"Every free, white male citizen of the United States, and he who has, in accordance with the laws of the United States, filed his declaration of intention to become such" * * * (see Appendix, No. 10).

Here again was found the same distinction between citizens and aliens; such was the condition of the statutory law, and such the condition of the Constitution of the State when Nebraska was admitted into the Union.

By reference to the Appendix it will be found, and such is the fact, that the same legislative and constitutional distinction between citizens and aliens has con-

tinued unbroken ever since that date. How can such legislation be harmonized with the argument that all inhabitants were citizens? If all inhabitants were citizens, *why was there a provision in the Constitution and in the statutes providing that aliens should file their declaration of intention to become citizens of the United States before they were entitled either to vote or to hold office?* To say that the aliens inhabiting the Territory when the State was admitted into the Union were thereby made citizens of the United States is in conflict with the political history of this country from the time the first State was admitted into the Union down to the present date.

THE LEARNED DISSENTING OPINION OF JUSTICE MAXWELL in the Court below (Record, pp. 56–75) is based upon one ground only, and that is that

"the Enabling Act admitting a State is in the nature of a treaty with the inhabitants of such State" (p. 73). Again, he says (p. 72): "The admission of a State into the Union partakes of the nature of a treaty with the inhabitants, that in consideration of their forming a State Government, they shall enjoy certain rights, privileges and immunities. It may be said to be to some extent a joinder of the law-making and treaty-making powers of the Government. Both parties derive benefit," &c., &c.

In support of this view the learned Judge refers to cases arising out of the acquisition by Treaty of Louisiana (pp. 66, 69, 71, 72), of Florida (p. 69) and

Texas (pp. 70, 71, 73), and concludes the discussion (p. 73) thus :

"On reason, therefore, every citizen of the Territory, when it was admitted into the Union, became *ipso facto* a citizen of the United States."

It is submitted that the whole foundation of this argument, resting as it does upon the notion that an enabling act is a treaty, is entirely fanciful. The idea of a treaty implies two autonomous contracting powers. Even our treaties with Indian tribes recognize this. M. Boutney well says :

" The characteristic of treaties in the general sense of the word is that they bring two nations and two sovereignties face to face " (English Court, 8).

The Organic Act, the Enabling Act, the Act admitting the State, are each and all simple legislative exertions of the powers of Congress, and in no correct sense treaties or the exercise of the treaty-making power. For the reasons hereinbefore stated we submit in conclusion of this part of the discussion, that there is no analogy between the case of the acquisition by treaty of foreign territory and the status of the inhabitants of the territory so acquired and the case of the national ownership of the public domain and the status of the people residing therein with the consent of the national government, which first erects a territorial government and subsequently makes provision to admit the territory thus erected as a State of the Union

CITIZENSHIP DATES FROM DECLARATION OF INDEPENDENCE, AND NOT FROM TIME WHEN ORIGINAL STATES ADOPTED THE CONSTITUTION OF THE UNITED STATES.

The rule in this country is that the "*Declaration of Independence*" in 1776 vested all persons *then* residing in the country, and who *adhered* to the interests of the colonies with citizenship (United States vs. Ritchie, 17 How., 540).

In Ingils vs. Trustees of the Sailors' Snug Harbor, 3 Peters, 121, it was said:

"The rule as to the *point of time* at which the American *ante nati* ceased to be British subjects differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is to take the treaty of peace in 1783; our rule is to take the *date* of the *Declaration of Independence.*" * * * "*Prima facie*, and as a general rule, the character in which the American *ante nati* are to be considered will depend upon and be determined by the situation of the party *and the election* made at the Declaration of ndependence, according to our rule, or the treaty of peace, according to the British rule."

This case also discloses that naturalization was not forced on inhabitants then residing here, but that they were still left to an *election* to remain and have citizenship or to remove and remain aliens. So it has been in cases of cession and treaty. *This country does not force citizenship on any foreign born person.* It was not forced on the inhabitants of Louisiana when we acquired it (see Martin's History Louisiana, quoted in the Appendix hereto, p. 83).

On the point that citizenship dated from the Declaration of Independence, and that a right of election must

also be left to the then inhabitant, it was said in Jackson vs. White, 20 Johnson, 322–324:

"I think it cannot be doubted that when a people, from a sense of the viciousness of the Government under which they have lived, are driven to the necessity of redressing themselves by throwing off the allegiance which they owed to that Government, and in its stead erecting a new and independent one of their own, that such of the members of the old Government *only* would become members of the new as choose *voluntarily* to submit to it. Every member of the old Government must have the right to *decide for himself* whether he will continue with a society which has so fundamentally changed its condition. For having been incorporated with a society under a form of government which was approved, no one can be required to adhere to that society when it has materially and radically changed its constitution. Every member submitted to the society as it was, and owed obedience to it while it remained the same political society. When it divests itself of that quality by an entire new institution of government, it cuts the knot which united its members, and discharges them from their former obligations (Vattel, B. 1, Ch. 3, § 33, and Ch. 16, § 195, Puffendorf, 639).

"These principles were expounded by Ch. J. M'KEAN in a very satisfactory manner in Chapman's case (1 Dallas Rep., 58). He observes that in civil wars every man chooses his party, but that all writers agree that the minority have individually and unrestrainingly a right to remove with their property into another country, and that a reasonable time for that purpose ought to be given; and in short, that none are subjects of the adopted country but *those who have freely assented to it.*" * * *

"That the *sovereignty* of the United States was erected by an *act of independence*, and that there can be no previous right in repect to it, and consequently none to lose; NOR CAN IT INCLUDE ANY OTHER THAN RESIDENTS AT THAT TIME WITHIN THE JURISDICTION OF THE STATE; and that therefore defendant, who was the widow of Kelly, prosecuting for her dower in lands acquired by her husband after the Declaration of Independence, who had been married to Kelly before the

Revolution, but who remained in Ireland before and after it, he having resided here and becoming a citizen, was held not to be endowable of such after-acquired lands.

"The decision fully sanctions the opinion that there must be even in case of *femme covert* some personal act indicative of an assent to become a member of the new government, without which the right of citizenship is not acquired."

THE ARGUMENT IN SUPPORT OF PROPOSITION THAT THE ADMISSION OF NEBRASKA INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES MADE ALL THE INHABITANTS THEREOF CITIZENS OF UNITED STATES, ERRONEOUSLY ASSUMES THAT ALL INHABITANTS OF THE ORIGINAL STATES BECAME CITIZENS OF UNITED STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION.

This assumption is based on an error that is fatal to the argument. Only those inhabitants became citizens who belonged to one of three classes:

1. Those who were inhabitants at the time of the Declaration of Independence and elected to remain in the Colonies.
2. Those who were native born.
3. Such aliens as came into the Colonies after the Declaration of Independence and naturalized in conformity to the laws of the original States or Colonies.

Judge MAXWELL, in his dissenting opinion in this case, says (Record, p. 71, fol. 124):

"Had Nebraska been one of the original nine States every inhabitant of the State would by the union have become a citizen of the United States."

The facts of history disprove the correctness of this statement of the learned Judge.

Prior to the passage of a naturalization law by Congress the *States* had the right to *naturalize aliens*. When the original States came into the United States such inhabitants thereof as were citizens by birth or by residing therein at the *Declaration of Independence*, or had been made citizens, if of foreign birth, *by the naturalization laws of said States*, became citizens of the United States, but none others. Persons of foreign birth who came into the States *after* the Declaration of Independence, and who had *not been naturalized* under the laws of the States, were still aliens, and *remained such aliens after the States came into the* Union.

In 1789 the seat of Mr. SMITH, elected to Congress from South Carolina, was contested. The question was, had he been a citizen of the United States seven years as required by the Constitution, so as to make him eligible? Mr. Smith was born in Charleston, South Carolina, of a family who were of the earliest settlers in that colony. When twelve years of age he was sent to Europe to be educated. He returned to South Carolina in 1783. *In 1784 South Carolina passed a law to naturalize aliens* but Mr. Smith had not availed himself of this law, and admitted that nothing had occurred since that date (1784) to make him a citizen and rested his claim of citizenship on the fact of being native

born. Mr. Smith in a speech made in his own defense said (Abridgement of the Debates of Congress, Vol. 1, p. 95):

"*An Act to confer the right of citizenship on aliens was passed March 26th, 1784.* For the purpose of possessing the subordinate rights of citizenship, such as an exemption from the alien duty, a residence for one year and taking the oath of allegiance was sufficient. To confer a right of voting at elections a person must have been admitted as a citizen two years prior to his voting; but for the higher privileges of a citizen, being eligible to offices of trust, to a seat in the Legislature and Privy Council, the *alien must be naturalized by law.* Now, in November, 1784, he was elected to the Legislature, and took his seat without objection in January, 1785, and was elected into the Privy Council October, 1785, all without being naturalized by law.

"In October, 1785, when he was elected to the Council, his election was opposed; but the objection now brought forward was not then made, and the memorialist himself—who was a member of the Legislature—voted in favor of the choice, though unquestionably unless he was considered by the Legislature a citizen before he returned to Charleston *nothing has afterwards occurred to make him so,* and the Alien Act of 1784 *positively required a naturalization by Act of Assemly to give him a qualification.*"

"The Constitution of South Carolina is silent as to citizenship, but allowed any person to vote at elections who had resided a year in the State and paid a certain tax; to be a member of the Assembly he must have resided three, and of a Privy Council five, years previous to his election, but nothing was said about citizenship. The Act of *1784, however, expressly defined who should and who should not be defined as citizens,* and consequently all persons who did not become citizens must have been held as aliens, and considered *so until they had conformed to the Alien Act of 1784.* Now, as he was admitted to offices of trust to which aliens were not admissible, and he was admitted to them without having the rights of citizenship conferred upon him in pursuance of that act, it followed clearly that the people *of South Carolina and the Legislature acknowledged him to be a citizen by virtue of the Revolution.*"

No claim was made that he became a citizen of the United States by the adoption of the Constitution of the United States in 1787 by the State of South Carolina. His position was to the contrary, as he said that if he was not a citizen prior to the Act of 1784 nothing had "*afterward occurred to make him so, and the Alien Act of 1784 positively required a naturalization by act of Assembly to give him a qualification.*"

Mr. MADISON said (p. 97):

"From attention to the facts which have been adduced, and from a consideration of the principles established by the Revolution, the conclusion I have drawn is that Mr. Smith was, *on the Declaration of Independence, a citizen of the United States;* and unless it appears that he had forfeited his right by some neglect or overt act, he had continued a citizen. * * *

"It is an established maxim that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place and sometimes from parentage; but in general, place is the most certain criterion; it is what applies in the United States. It will, therefore, be unnecessary to investigate any other. Mr. Smith founds his claim upon his *birthright.* His ancestors were among the first settlers of that colony."

Mr. Smith was held to be a citizen of the United States from the date of the *Declaration of Independence* by reason of his having been *born in this country.* It is quite evident that if he had not been considered an *inhabitant* of South Carolina at the date of the *Declaration of Independence* it would have been necessary for him to have been *naturalized under the Act of 1784 to become a citizen.* No member *suggested* the *idea* that all *inhabitants* of South Carolina at the adoption of the Constitution of the United States thereby *became citizens.*

The fact that the *original States naturalized aliens* by

some positive law was adverted to in the debates on the first naturalization law passed by Congress in 1790. Mr. HARTLEY said (Abridgment of the Debates of Congress, Vol. 1, p. 185):

"*The practice of almost every State in the Union countenanced a regulation of this nature*; and perhaps it was owing to a wish of this kind that the States had consented to give this power to the General Government."

Mr. SHERMAN said (same page, 185):

"He presumed it was intended by the Convention who framed the Constitution that Congress should have the power of naturalization in order to prevent particular States receiving citizens and forcing them on others who would not receive them in any other manner."

Mr. HUNTINGTON, from Connecticut, said (p. 185):

"In the State to which I belonged no person could be naturalized but by an Act of the Legislature; the same is the case in several of the other States and in Britain."

The contested election of Mr. GALLATIN to the U. S. Senate, referred to above (*ante*, p. 26), throws much light on this question. Albert Gallatin came to America from Switzerland in 1780. He landed in *Massachusetts*, thence went to *Maine* and enlisted in the Continental army. In *1783* he taught French in Harvard College. In *1784* he formed a settlement in *Virginia*. In 1786 he removed and settled in *Fayette County, Pa.* All this occurred *before* the *adoption* of the *Constitution* of the United States. Gallatin claimed citizenship from the time he took oath *of allegiance in Massachusetts and also* from the time he became *naturalized in Virginia.*

In speaking of naturalization in Virginia, under a law of *1783*, Mr. LEWIS said (Vol. 1, p. 449, Ab. Debates) :

"But in *Virginia two oaths are required* and they must be taken in a Court, not before a magistrate, to entitle a man to citizenship. He must also be possessed of a certain amount of property and be a resident for two years."

In speaking of the laws of the other States on this subject, Mr. LEWIS said (p. 449, Vol. I., Ab. of Debates) :

"It is implied *by all of them that certain oaths, residence and property make the requisites to form citizenship.* In Massachusetts a foreigner is not a citizen without he complies with those terms (citing laws of Massachusetts). From these he maintained that no such wild idea was ever contemplated by either the law of *Massachusetts* or *Virginia*, as to admit foreigners or persons from other States to citizenship immediately upon their entrance within their limits."

Mr. LEWIS then cited laws of Pennsylvania of March 13, 1784, to show that a record must be kept by the *Master of the Rolls* of the *persons* admitted to *citizenship.*

Mr. Gallatin, in his own defense (p. 457), claimed citizenship from the fact that he had been an inhabitant of the Colonies and States for thirteen years, and that such citizenship should date from that time. In this discussion, Mr. Gallatin being in fact an inhabitant of Pennsylvania at the time that State ratified the Constitution, neither side claimed that he became a citizen of the United States thereby. The Senate decided that he was not eligible to the seat, and that his election as Senator from Pennsylvania was void (p. 452, Vol. 1, Abridgment of Debates of Congress ; *ante*, p. 27).

The fact that *aliens residing in the original States* at the adoption of the Constitution *did not thereby become citizens of the United States* was again brought to the attention of Congress in the debates on the naturalization laws in 1798. In 1798 the House voted to require a residence of *fourteen years* as a prerequisite to naturalization. This provision was *assailed* on the ground that it would *postpone the right of naturalization* to aliens who had become *inhabitants of the United States before the adoption of the Constitution in 1787*, and who had *not* been naturalized under the State Laws.

Mr. GALLATIN said:

"As the bill stands at present, it would have a retrospective effect on three descriptions of persons, viz.: *All those aliens who were in this country prior to the adoption of the present Constitution of the United States* and who were not *naturalized* under the State laws prior to 1790." (Abridgment of the Debates of Congress, Vol. 2, p. 277.)

Why make this statement if the admission of the States operated to naturalize the aliens who were residing here when the original States were admitted into the United States by the adoption of the Constitution? The correctness of the statement was not challenged in that debate. Mr. Gallatin sought to amend the bill to make an exception of fourteen years' residence in favor of the class of aliens spoken of, but the same did not meet with much favor.

Mr. W. Claiborne, of Tennessee, favored the amendment offered by Mr. Gallatin, as the bill would similarly affect many people living in his State. Tennessee was admitted into the Union *June 1, 1796.*

Mr. CLAIBORNE said:

"He could not reconcile it to his feelings to vote for the bill without the amendment proposed by the gentleman from Pennsylvania, *because it would be doing a number of people* whom he represented the greatest injustice. These people, he said, were peculiarly situated. It was only at the last winter session that the State of Tennessee was represented on this floor; and, at the time of passing the naturalization law, the people of that country were not in a situation to receive information of what was done in Congress. It need not be a matter of surprise, therefore, if in that frontier country *there are many persons aliens who did not take advantage of the law of 1790.* There are numbers of such who have given the strongest proof of attachment to the country; they have fought and bled in the service of the United States, and are as much wedded to the Government of the United States as any man born on American soil. If this amendment does not prevail, it will affect many valuable citizens of the State *of Tennessee who were citizens in the year 1795*, and TEN *years before that time.* These persons would be deprived of rights, because they were living in a country where there was no post road, and where, of course, they had no newspapers to give them information of was going on at the seat of Government. He hoped, therefore, it would not be agreed to."

The *class of persons* Mr. Claiborne referred to *were inhabitants of Tennessee when the State was admitted into the Union*, and who were nevertheless *aliens, because not naturalized under the Act of 1790 or the Act of 1795.*

FOR FURTHER PROOF THAT THE ORIGINAL STATES RECOGNIZED CERTAIN OF THEIR INHABITANTS AS ALIENS, AND REQUIRED SOME FORM OF NATURALIZATION OF PERSONS OF FOREIGN BIRTH BEFORE THEY COULD BECOME CITIZENS, WE NOW REFER TO THE LAWS ON THIS SUBJECT IN SOME OF THE ORIGINAL STATES:

VIRGINIA. Jefferson drafted an act which was intro-

duced in the House of Delegates by George Mason and became a law June 26, 1779, which provided:

"All white persons born within the Territory, and all who have resided therein two years next before the passing of this act, and all who shall hereafter migrate into the same, other than alien enemies, *and shall take the prescribed oath before a court of record that they intend* to reside therein, and, *morover, shall give assurance of fidelity to the Commonwealth*, ' shall be deemed citizens.' "

Another section of the act defined *Aliens* (See Sec. 135, Morse on Citizenship).

VERMONT. Chap. 2, Sec. 18, Constitution of 1786, provided that all persons to be entitled to the privileges of a freeman should take an oath:

"*You do solemnly swear* (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same as established by the Constitution, without fear or favor of any man."

Morse on Citizenship, Sec. 244.

SOUTH CAROLINA. Act of 1778 provided that all free white persons *may become citizens* on *taking an oath of allegiance* as provided therein.

Lasportas vs. De La Motta, 10 Rich., 42.

PENNSYLVANIA AND MASSACHUSETTS. See speech of Mr. LEWIS in the Gallatin case heretofore quoted, and what is there said about others of the original States.

ALIENS WHO PARTICIPATE IN FORMING A STATE CONSTITUTION ARE NOT MADE EITHER CITIZENS OF THE STATE OR OF THE UNITED STATES BY THE ADMISSION OF THE STATE INTO THE UNION.

Objection was made to the admission of Michigan into the Union because aliens were allowed to vote in forming the State Government. The opinion prevailed among some Senators that no State should be admitted into the Union that allowed aliens such privileges. Other Senators were of the opinion that no harm could result therefrom, and that such aliens did not become citizens of the State thereby, and were not entitled to privileges of citizens in other States, much less citizens of the United States. *No Senator contended that such aliens became citizens of the United States by the admission of Michigan into the Union.*

The remarks of Senator BUCHANAN are instructive (see "Congressional Globe," April 1, 1836, Appendix, p. 393):

"I shall not follow the example of my friend from New York (Mr. Wright), and proceed to make some suggestions upon another point. They are intended merely as suggestions, for I can say with truth, I have formed no decided opinion upon the subject. A friend called to see me last evening, and attempted to maintain the proposition that the several States, under the Constitution of the United States, and independent of the ordinance applicable to the Northwestern Territory, had the power of conferring the right to vote upon foreigners resident within their Territories. This opinion was at war with all my former impressions. He requested me to do as he had done, and to read over the Constitution of the United States carefully with a view to this question. I have complied with his request, and shall now throw out a few suggestions upon this subject merely to elicit the opinion of others."

"The older I grow, the more I am inclined to be what is called 'a State's rights man.' The peace and security of this Union depends upon giving to the Constitution a literal and fair construction, such as would be placed upon it by a plain intelligent man, and not by ingenious construction to increase the powers of this Government and thereby diminish those of the States.

The rights of the States, reserved to them by that instrument, ought ever to be held sacred. If then the Constitution leaves to them to decide according to their own discretion, unrestricted and unlimited, who shall be electors, it follows as a necessary consequence, that they may if they think proper, confer upon resident aliens the right to vote.

"It has been supposed, and it is perhaps generally believed that this power has been abridged by that clause in the Constitution which declares that the 'citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.' *Does then a State by conferring upon a person not a citizen of the United States the privilege of voting, necessarily constitute him a citizen of such State?* Is the elective franchise so essentially connected with citizenship that the one cannot exist without the other? This is the question. *If it be so, no State can exercise this power; because no State by bestowing upon an alien the privilege of voting, can make him a citizen of that State, and thereby confer upon him the privileges and immunities of citizens of the several States. Citizens are either natives* of the country *or they are naturalized.* To Congress *exclusively belongs the power of naturalization; and I freely admit that no foreigner can become a citizen of the United States but by complying with the provisions of the Acts of Congress upon this subject.* But still we are brought back to the question, may not a State bestow upon a resident alien the right to vote within its limits, as a personal privilege, *without conferring upon him the other privileges of citizenship, or ever intending to render it obligatory upon the other States to receive him as a citizen? Might not Virginia refuse to a foreigner who has voted in Illinois, without having been naturalized, the privileges and immunities of one of her citizens, without any violation of the Constitution of the United States? Would such an alien have any pretext for claiming under the Constitution of the United States the right to vote within a State where citizens of the United States alone are voters?*"

THE FACT THAT THE ORIGINAL STATES DETERMINED FOR THEMSELVES WHAT INHABITANTS WERE CITIZENS, AND EXCLUDED FOREIGNERS WHO CAME IN AFTER THE DECLARATION OF INDEPENDENCE UNTIL THEY WERE NATURALIZED, AND THAT UNNATURALIZED FOREIGNERS, ALTHOUGH THEY MAY HAVE BEEN PERMITTED TO VOTE, WERE NOT CITIZENS FOR ANY PURPOSE IS SUPPORTED BY JUDICIAL AUTHORITY.

In Dred Scott vs. Sandford (19 How., 393), Chief-Justice TANEY said:

"In discussing this question we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. *It does not by any means follow because he has all the rights and privileges of a citizen of a State that he must be a citizen of the United States. He may have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State.* For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course *was confined to the boundaries of the State, and gave him no rights and privileges in other States* beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien or any one it thinks proper, or upon any class or description of persons; *yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States,* nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held

by this Court to be so. Consequently, *no State*, since the adoption of the Constitution, *can by naturalizing an alien* invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attach to that character.

"It is true, every person and every class and description of persons who were at the time of the adoption of the Constitution *recognized* as citizens in the several States became also citizens of this new political body, *but none other*. It was formed by them and for them and their posterity, but for no one else. * * *

"*The alien is excluded, because, being born in a foreign country, he cannot be a member of the community until he is naturalized.* * * *

"*No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people within their own territories. The right of naturalization was therefore with one accord surrendered by the States, and confided to the Federal Government.* And this power granted to Congress to establish a uniform rule of naturalization, is, by the well understood meaning of the word, confined to persons born in a foreign country under a foreign government. * * *

"The word citizen excluded and no doubt intended to *exclude foreigners* who had not become citizens of some one of the States when the Constitution was adopted, *and also every description of persons who were not fully* recognized as citizens in the several States." * * *

"So, too, a person may be entitled to vote by the law of the State who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, *but that does not make them citizens of the State, and still less of the United States.* And the provisions in the Constitution giving privileges and immunities in other States does not apply to them." * * *

Justice McLEAN, in the same case, to show that the laws of naturalization must apply to all foreigners save such as are covered and included in some treaty or cession, said (p. 533):

"In Chirac vs. Chirac (2 Wheat., 261) this Court says: 'That the power of naturalization is exclusively in Congress does not seem to be and certainly ought not to be controverted.' No person can legally be *made a citizen of a State*, and consequently *a citizen of* the United States, *of foreign birth, unless he be naturalized* under the Acts of Congress. Congress has power to established a uniform rule of naturalization.

"It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, *but it has no power to naturalize foreigners* and GIVE THEM THE RIGHTS OF CITIZENS. Such a right is opposed to the Acts of Congress on the subject of naturalization and subversive to the federal powers. I regret that any countenance should be given from this Bench to a practice like this in some of the States, which has no warrant in the Constitution. * * * Under the late treaty with Mexico we have made citizens of grades, combinations and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no State ever held, that the people of these Territories did not become citizens under the *treaty*. They have exercised all the rights of citizens under the *treaty* without being naturalized under the Acts of Congress."

The power of the States to determine who shall be citizens thereof is confined to persons born within their respective limits, and such power cannot and does not extend to persons of foreign birth. Justice CURTIS in the same case said:

"The Constitution has left to the States the determination what persons, *born within their respective limits* shall acquire by birth citizenship of the United States; *it has not left them any power to prescribe any* rule for

the removal of the *disabilities of aliens*. This power is exclusively in Congress."

In speaking of the privileges of the inhabitants of Louisiana under the Treaty of Paris of 1803, Justice CURTIS (p. 631) construed it as confined to the *then inhabitants* of Louisiana.:

"The first is that manifestly its sole object was to protect individual rights of the *then inhabitants* of the territory."

The change made by Section 2 of Article 5 of the Constitution of 1875 was purposely made in view of the Fourteenth Amendment, and adopts its definition of National and State citizenship.

The definition of National citizenship is thus defined by the Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This definition has been authoritatively construed by this Court in the Slaughter House cases (16 Wallace) and in Minor vs. Happersett (21 Wallace). Extracts from the opinions of the Judges of this Court in these cases are for convenience given in the Appendix hereto.

Sec. 2, Art. 5 of State Constitution in pari materia with the Fourteenth Amendment.

Sec. 2, Art. 5 of the Constitution of Nebraska of 1875, ordaining that

"No person shall be eligible to the office of Governor

who shall not have been for two years next preceding his election a citizen of the United States and of this State,"

was adopted after the Fourteenth Amendment of the Constitution of the United States, and the words in said Sec. 2, Art. 5 of the State Constitution, "citizen of the United States and of this State," mean such citizen as citizen is defined by the Fourteenth Amendment of the Federal Constitution.

The Constitution of Nebraska of 1866, adopted prior to the Fourteenth Amendment, Art. 2, Sub-title "Executive," Sec. 4, was as follows:

"SECTION 4. No person except a citizen of the United States, and a qualified elector of the State, shall be eligible to any office provided for by this Constitution."

As Boyd was not born in this country and had not been naturalized in the United States at the date of his supposed election as Governor, he was not a citizen of the United States, as such citizenship is defined by the 14th Amendment, as construed by this Court, nor is he such citizen within the meaning of Section 2 of Article 5 of the Constitution of Nebraska, in force at the date of said election.

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APPENDIX.

No. 1.

Revised Statutes of the United States.

NATURALIZATION.

"Aliens, how naturalized."

"SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner and not otherwise;"

"Declaration of intention." "14 April, 1802, c. 28, ss. 1, 3, v. 2, pp. 153, 155." "26 May, 1824, c. 186, s. 4, v. 4, p. 69." "1 Feb., 1876, c. 5, v. 19, p. 2."

"FIRST. He shall declare on oath, before a Circuit or District Court of the United States, or a District or Supreme Court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly, by name, to the prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject."

"Oath to support the Constitution of the United States." "14 April, 1802, c. 28, s. 1, v. 2, p. 153."

"SECOND. He shall, at the time of his application to be admitted, declare on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state or sovereignty, and particularly, by name, to the prince, potentate, state or sovereignty of which he was before a citizen or subject, which proceedings shall be recorded by the Clerk of the Court."

"Residence in United States, or States, and good moral character."

"THIRD. It shall be made to appear to the satisfaction of the Court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence."

"Minor residents."

"SEC. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the Court that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."

"26 May, 1824, c. 186, s. 1, v. 4, p. 69."

"Widow and children of declarants."

"SEC. 2168. When any alien who has complied with the first condition specified in section twenty-one hundred and sixty-five dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such upon taking the oaths prescribed by law."

"26 Mar., 1804, c. 47, s. 2, v. 2, p. 293."

"Children of persons naturalized under certain laws to be citizens."

"SEC. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof, and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the Legislature of the State in which such person was proscribed."

"14 April, 1802, c. 28, s. 4, 2, p. 155."

No. 2.

Treaty of Paris of April 30th, 1803.

"ARTICLE 3. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

Chief-Justice MARTIN, in his "History of Louisiana," describes the ceremonies attending the transfer of the Province of Louisiana from Spain to France, in 1803 (Edition 1882, p. 295). The representative of the Spanish king "declared that such of his majesty's subjects in Louisiana as made it their election to live under

the authority of the French Republic were absolved from their oath of fidelity and allegiance to the Crown of Spain."

So, on the almost simultaneous transfer by the representative of France to the Commissioners of the United States, MARTIN says the former "then declared that such of the inhabitants as chose to pass under the Government of the United States were absolved and released from their allegiance to the French Republic" (*Ib.*, p. 297).

No. 3.

Organic Act.

Extracts from "An Act to organize the Territories of Nebraska and Kansas." Approved May 30th, 1854. (Vol. 10, U. S. Statutes at Large, page 277.)

SEC. 4. "And be it further enacted, that the legislative power and authority of said Territory shall be vested in the Governor and a Legislative Assembly. The Legislative Assembly shall consist of a Council and House of Representatives. The Council shall consist of thirteen members *having the qualifications of voters, as hereinafter prescribed*, whose term of service shall continue two years. The House of Representatives shall, at its first session, consist of twenty-six members, *possessing the same qualifications as prescribed for members of the Council*, and whose term of service shall continue for one year. The number of representatives may be increased by the Legislative Assembly from time to time, in proportion to the increase of qualified voters; provided, that the whole number shall never exceed thirty-nine. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts for the election of the Council and Representatives, giving to each section of the Territory representation *in the ratio of its qualified voters as nearly as may be.* And the members of the Council and of the House of Representatives shall reside in and be inhabitants of the district or county or counties for which they may be elected respectively. Previous to the first election,

the Governor shall cause a census or enumeration of the inhabitants and *qualified voters* of the several counties and districts of the Territory to be taken by such persons and in such mode as the Governor shall designate and appoint; and the persons so appointed shall receive a reasonable compensation therefor. And the first election shall be held at such time and places, and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the Governor shall appoint and direct; and he shall at the same time declare the number of members of the Council and House of Representatives to which each of the counties or districts shall be entitled under this act. The persons having the highest number of legal votes in each of said Council districts for members of the Council shall be declared by the Governor to be duly elected to the Council; and the persons having the highest number of legal votes for the House of Representatives shall be declared by the Governor to be duly elected members of said House: Provided that in case two or more persons voted for shall have an equal number of votes, and in case a vacancy shall otherwise occur in either branch of the Legislative Assembly, the Governor shall order a new election; and the persons thus elected to the Legislative Assembly shall meet at such place and on such day as the Governor shall appoint; *but thereafter, the time, place and manner of holding and conducting all elections* by the people, and the apportioning the representation in the several counties or districts to the Council and House of Representatives, *according to the number of qualified votes shall be prescribed by law*, as well as the day of the commencement of the regular sessions of the Legislative Assembly: Provided, That no session in any one year shall exceed the term of forty days, except the first session, which may continue sixty days."

"SEC. 5. (Qualification of voters.) *And be it further enacted, That every free white male inhabitant above the age of twenty-one years who shall be an actual resident of said Territory, and shall possess the qualifications hereinafter* prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within said Territory; but the qualifications of voters, and of holding office, at all subsequent elections, shall be such

as shall be prescribed by the Legislative Assembly; *provided, that the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such*, and shall have taken an oath to support the Constitution of the United States and the provisions of this act; and, provided further, that no officer, soldier, seaman, or marine, or other person in the army or navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote or hold office in said Territory, by reason of being on service therein.

No. 4.

Elections (Session Laws Nebraska, 1855, p. 8).

"EXECUTIVE DEPARTMENT,
"TERRITORY OF NEBRASKA, NOV. 21, 1854.

"Rules for conducting the elections in Nebraska Territory, December 12th, 1854."

* * * * * *

"7th. Any person offering to vote may be challenged as unqualified by either of the judges, or by any person who is an elector in the Territory, and it is the duty of the judges to challenge any person whom they know or suspect not to be duly qualified.

"8th. When any person is so challenged, on taking the following oath his vote shall be received, '*You do solemnly swear that you are a citizen of the United States;* that you are a resident of this precinct; that you are twenty-one years of age, as you verily believe; that you intend to be a permanent resident of Nebraska Territory, and that you have not voted at this election?

"Given under my hand at Belleview, Nebraska Territory, this 23d day of November, 1854.

(Signed) T. B. CUMING,
Acting Governor of Nebraska."

No. 5.

"An Act Regulating Elections."

"Be it enacted by the Council and House of Representatives of the Territory of Nebraska." * * *

"SEC. 10. *Every free white male citizen of the United States*, who has attained the age of twenty-one years, shall be entitled to vote in the precinct where he resides, at all elections, provided he has been an inhabitant of this Territory forty days and of the County twenty days next preceding the election."

"SEC. 11. Any member of the Board of Electors or persons who have voted at such election, may challenge any elector proposing to vote, whereupon one of the said board shall tender to such elector the following oath:

"I, A B, do solemnly swear that *I am a citizen of the United States*; that I have resided in the County of .....for the last twenty days, and in this Territory for the last forty days, and have attained the age of twenty-one years to the best of my knowledge and belief.

Upon taking such oath his ballot shall be received."

"SEC. 12. Any person taking any of the oaths herein contained, knowing them to be false, shall be deemed guilty of perjury."

"Approved March 16th, 1855."

See Session Laws 1855, p. 71.

No. 6.

Criminal Code, approved March 15, 1855.

"SEC. 131. If any person wilfully vote who has not been a resident of this Territory for six months next preceding the election, or who at the time of the election is not twenty-one years of age, *or who is not a citizen of the United States*, or who is not duly qualified from other disability to vote at the place where and time when the vote is to be given, he shall be fined in a sum not exceeding three hundred dollars, or imprisoned in the county jail not exceeding one year.

See Session Laws, 1855, p. 243.

No. 7.

Election Laws of Nebraska.

Chapter 9. ELECTIONS; approved January 26th, 1856. Session Laws 1856.

"SEC. 10. Every free white male *citizen of the United States*, who has attained the age of twenty-one years, and *those who shall have declared on oath their intention to become such*, and shall have taken an oath to support the Constitution of the United States, and the provisions of the organic law of this Territory, shall be entitled to vote in the precinct where he resides, at all elections. Provided, he has been an inhabitant of this Territory forty days and of the county twenty days next preceding the election."

"SEC. 11. Any member of the Board of Electors, or persons who have voted at such election, may challenge any elector proposing to vote, whereupon one of the said board shall tender to such elector the following oath: *I, A B, solemnly swear that I am a citizen of the United States, or that I have taken an oath to become such* (as the case may be); that I have been an inhabitant of the County of ——— for the last twenty days, and in this Territory for the last forty days, and have attained the age of twenty-one years to the best of my knowledge and belief.

Upon taking such oath his ballot shall be received."

"SEC. 12. Any person taking any of the oaths herein contained, knowing them to be false, shall be deemed guilty of perjury."

CHAPTER 27. OFFICES; approved Jan. 26th, 1856.

"SEC. 4. *Neither shall any person be entitled to hold any office of trust or profit in this Territory unless he be a free white male citizen of the United States*, and over the age of twenty-one years."

Elections.

"AN ACT to amend Chapter 9th of the Code of Nebraska, entitled Elections, approved January 26th, 1856.

"SECTION 1. Be it enacted by the Council and House of Representatives of the Territory of Nebraska: That

Section Eleven of Chapter Nine of the Code of Nebraska, approved January 26, 1856, be amended so as to read as follows: Any member of the Board of Election, or any other qualified elector, may challenge any elector proposing to vote at any election in this Territory, who when so challenged, shall take the following oath, to be administred by one of the board, before he shall be entitled to vote: '*You, A B, do solemnly swear (or affirm, as the case may be) that you are a citizen of the United States (or have declared your intention in a court of competent jurisdiction to become such)*, that you have been an inhabitant of the Territory of Nebraska for the last forty days, of the County of ——— for the last twenty days, and of this precinct for the last five days, and have attained the age of twenty-one years to the best of your knowledge and belief; that you will support the Constitution of the United States and the Organic Act of this Territory; that you have not aided, and will not aid, either directly or indirectly, the organized rebellion now existing in the United States, and that you are opposed to any State or Territory of the United States seceding or withdrawing from the same.' The judges and clerks of election shall each respectively take and subscribe a similar oath, to be indorsed upon the poll-book, before entering upon the discharge of their duties as such. The provisions of this act shall apply to all elections, both general and special, to be hereafter held in this Territory."

"AN ACT respecting elections, approved January 10th, 1862."

"SEC. 5. *Every free white male citizen of the United States, and those who have, in accordance with the Laws of the United States, filed their declaration of intention to become such*, and who have attained the age of twenty-one years, shall be entitled to vote at any election in this Territory. * * *

"SEC. 10. Any person who shall vote in this Territory, who has been a resident thereof forty days immediately preceding the election; or who, at the time of the election is not twenty-one years of age, he knowing the same; *or who is not a citizen of the United States, or declared his intention to become such*, as provided by law, he knowing the same, shall, on conviction

thereof, be imprisoned in the penitentiary and kept at hard labor not less than six months nor more than three years."

"SEC. 11. Any person who shall procure, aid, counsel or advise another to give his vote, knowing that such other person has not been a resident of this Territory forty days immediately preceding the election; or at the time of the election is not twenty-one years of age; *or that he has not declared his intention to become a citizen of the United States as provided by law;* or that he is not duly qualified from other disability, to vote at the place where and time when the vote is to be given, shall, on conviction thereof, be fined in any sum not exceeding five hundred dollars, and be imprisoned in the penitentiary and kept at hard labor not less than one year nor more than five years."

"SEC. 15. If a person offering to vote is challenged as being unqualified by one of the judges of the election or by an elector one of the judges shall tender to to him the following oath or affirmation: 'You do swear (or affirm) that you will fully and truly answer all such questions as shall be put to you touching your place of residence and qualifications as an elector at this election.'

"FIRST. *If the person be challenged as unqualified on the ground that he has not made his declaration of intention to become a citizen of the United States*, the judges, or one of them, shall put the following question: '*Have you made your declaration of intention to become a citizen of the United States?*' If the person offering to vote answers affirmatively, he shall, *before his vote is received, produce for the inspection of the judges of election his declaration of intention to become such citizen*, properly sworn to before competent authority, and shall state, under oath or affirmation, that he is the identical person named therein; Provided, That the production of said declaration shall be dispensed with if the person offering to vote shall state, under oath or affirmation, when and where he made such declaration of intention to become a citizen of the United States, and that against his will his paper containing evidence of his having so made his declaration is lost, destroyed, or beyond his power to produce to the judges of election. Provided, further, that if he shall state, under oath or affirmation, that

by reason of the naturalization of his parents, or one of them, he has become a citizen of the United States, and when and where his parent or parents were naturalized, no declaration of his intention to become such citizen need be produced." * * *

"SEC. 18. If a person's vote be challenged, and such challenge be not withdrawn after he shall have answered the foregoing questions, or such of them as may be necessary, the judges of election, or one of them, shall tender to him the following oath: '*You do solemnly swear (or affirm) that you are a citizen of the United States (or have made your declaration of intention to become such)*, of the age of twenty-one years; that you have been an inhabitant of this Territory for forty days next preceding the election; that you are now an actual resident of this precinct (or ward), and that you have not voted at this election.'

"SEC. 22. If any person challenged as unqualified to vote shall be guilty of wilful and corrupt false swearing or affirming in taking any oath or affirmation prescribed by this act such person shall be adjudged guilty of wilful and corrupt perjury, and upon conviction thereof shall suffer the punishment attached by the laws of this Territory to the crime of perjury."

"AN ACT to provide for ELECTIONS, approved February 15th, 1864. SEC. 37. *Every free white male citizen of the United States, and he who has, in accordance with the laws of the United States filed his declaration of intention to become such*, and who has attained the age of twenty-one years, and shall have been an actual resident of this Territory for six months, of the county twenty days, and of the precinct or ward where he intends to vote ten days next preceding the election, shall be entitled to vote at any election in this Territory." * * *

"SEC. 42. Any person who shall vote in this Territory who has not been a resident thereof six months immediately preceding the election, or who at the time of the election is not twenty-one years of age, he knowing the same, *or who is not a citizen of the United States, or declared his intention to become such, as provided by law*, he knowing the same, on conviction thereof, be imprisoned in the penitentiary, and kept at hard labor not less than six months nor more than three years."

"SEC. 47. If any person offering to vote is challenged as being unqualified, by one of the judges of election, or by any elector, one of the judges shall tender to him the following oath or affirmation: You do swear or affirm that you will fully and truly answer all questions as shall be put to you touching your place of residence and qualifications as an elector at this election."

"SEC. 48. If the person be challenged as *unqualified, on the ground that he has not made his declaration of intention to become a citizen of the United States*, the judges, or one of them, shall put the following question: '*Have you made your declaration of intention to become a citizen of the United States?*' If the person offering to vote answers affirmatively he shall, before his vote is received, *produce for the inspection* of the judges of election his declaration of intention to become such citizen, perfectly sworn to before competent authority, and shall also state under oath or affirmation that he is the identical person therein named; provided that the production of said declaration shall be dispensed with if the person offering to vote shall state under oath or affirmation when and where *he made such such declaration of intention to become a citizen of the United States*, and that against his will his paper containing evidence of his having so made his declaration is lost, destroyed, or beyond his power to produce to the judges of election; and provided further, *That if he shall state under oath or affirmation that by reason of the naturalization of his parents, or one of them, he has become a citizen of the United States, and when and where his parent or parents were naturalized*, no declaration of his intention need be produced.

"SEC. 51. If a person's vote be challenged and such challenge be not withdrawn after he shall have answered the foregoing questions, or such of them as may be necessary, the judges of election, or one of them, shall tender to him the following oath: '*You do* '*solemnly swear that you are a citizen of the United States* '*(or have declared your intention to become such)*, that 'you have been an inhabitant of the Territory of Ne-'braska for the last six months, and of the county 'of.....for the last twenty days and of this 'precinct for the last ten days; that you have 'attained the age of twenty-one years, to the best of 'your knowledge and belief; that you will support the

'Constitution of the United States and the Organic Act 'of this Territory; that you have not, either directly or 'indirectly, given and will not give any aid whatever 'to any rebellion or insurrection against the Govern- 'ment of the United States.' Provided, however, that if any person shall have accepted the President's Amnesty Proclamation, and have taken the oath of loyalty therein prescribed, the judges of election, or one of them, shall tender to him the following oath: '*You do solemnly swear (or affirm) that* '*you are a citizen of the United States (or have* '*declared your intention to become such)*, that you have 'been an inhabitant of the Territory of Nebraska for 'six months last past, and of the county of .....for 'the last twenty days; that you have attained the age of 'twenty-one years to the best of your knowledge and 'belief; that you will support the Constitution of the 'United States and the Organic Act of this Territory; 'and although you may have given aid to the present 'Rebellion, you have since accepted of the terms of the 'President's Amnesty Proclamation, and have taken 'the oath therein prescribed, and that you will here- 'after faithfully adhere to the same, and will neither 'directly or indirectly give any aid whatsoever to any 'rebellion or insurrection against the Government of 'the United States.'

"SEC. 55. If any person challenged as unqualified to vote shall be guilty of wilful and corrupt false swearing or affirming, in taking any oath or affirmation prescribed by this act, such person shall be adjudged guilty of wilful and corrupt perjury, and upon conviction thereof, shall suffer the punishment attached by the laws of this Territory to the crime of perjury."

"SEC. 62. That chapter ninth of an act entitled 'An Act revising, consolidating and preparing a general code for the Territory of Nebraska,' approved January 26th, A. D. 1856; an act entitled 'An Act to amend an act in relation to elections,' approved January 26th, 1856, and approved February 13th, 1857; an act entitled 'An Act proving for the election of judges and clerks of election, and defining their duties,' approved January 10th, 1862; and 'An Act respecting elections', approved January 10th, 1862, and all other acts inconsistent with this act be and the same are hereby repealed; Provided, however, that nothing in this act

contained shall affect or invalidate any laws of this Territory which enable the militia and volunteers of this Territory, when in the military service of the United States, to exercise the right of suffrage."

No. 8.

Enabling Act.

"AN ACT to enable the People of Nebraska "to form a Constitution and State "Government, and for the admission of "such State into the Union on an equal "footing with the original States."

(Passed April 19th, 1864, 13th U. S. Statutes at Large page 47).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a Constitution and State Government, with the name aforesaid, which State when so formed shall be admitted into the Union as hereinafter provided." * * *

"SEC. 3. And it be further enacted, *that all persons qualified by law* to vote for representatives to the General Assembly of said Territory *shall be qualified to be elected;* and *they* are hereby *authorized to vote* for and choose representatives to form a convention, under such rules and regulations as the Governor of said Territory may prescribe, and *also to vote upon the acceptance or rejection of such constitution* as may be formed by said convention, under such rules and regulations as said convention may prescribe; and if any of said citizens are enlisted in the army of the United States, and are still within said Territory, they shall be permitted to vote at their place of rendezvous; and if any are absent from said Territory, by reason of their enlistment in the Army of the United States, they shall be permitted

to vote at their place of service, under the rules and regulations in each case to be prescribed as aforesaid; and the aforesaid representatives to form the aforesaid convention shall be apportioned among the several counties in said Territory in proportion to the population as near as may be, and said apportionment shall be made for said Territory by the Governor, Umited States District Attorney and Chief-Justice thereof, or any two of them. And the Governor of said Territory shall by proclamation on or before the first Monday of May next order an election of the representatives aforesaid to be held on the first Monday in June thereafter throughout the Territory, *and such election shall be conducted in the same manner as is prescribed by the laws of said Territory regulating elections* therein for members of the House of Representatives; and the number of members to said convention shall be the same as now constitute both branches of the Legislature of the aforesaid Territory." * * *

"SEC. 5. And be it further enacted, that in case a Constitution and State Government shall be formed for the people of said Territory of Nebraska, in compliance with the provisions of this act, that said convention forming the same shall provide by ordinance for submitting said Constitution to the people of said State for their ratification or rejection at an election to be held on the second Tuesday of October, one thousand eight hundred and sixty-four, at such places and under such regulations as may be prescribed therein, *at which election the qualified voters*, as hereinbefore provided, shall vote directly for or against the proposed constitution, and the returns of said elections shall be made to the acting Governor of the Territory, who, together with the United States District Attorney and Chief-Justice of said Territory, or any two of them, shall canvas the same, and if a majority of the *legal votes* shall be cast for said Constitution in said proposed State, the said acting Governor shall certify the same to the President of the United States, together with a copy of the said Constitution and ordinances; whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original States, without any further action whatever on the part of Congress."

No. 9.

Constitution of Nebraska, Approved Feb. 9, 1866.

ART. 2, SEC. 2. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State, County, Precinct and Ward for the time provided by law shall be an elector :

"*First.* White citizens of the United States."

"*Second.* White persons of foreign birth who shall have declared their intention to become citizens conformable to the laws of the United States on the subject of naturalization."

No. 10.

Revised Statutes of Nebraska of 1866.

"CHAPTER 17, SEC. 33. *Every free white male citizen of the United States,* and he who has, in accordance with the laws of the United States, *filed his declaration of intention to become such,* and who has attained the age of twenty-one years, and shall have been an actual resident of this Territory for six months, of the county twenty days, and of the precinct or ward where he intends to vote, ten days preceding the election, shall be entitled to vote at any election in this Territory." * * *

SEC. 44. If the person be challenged on the ground that he had not made his declaration of intention to become a citizen of the United States, the judges, or one of them, shall put the following question : '*Have you made your declaration of intention to become a citizen of the United States?*'

"SEC. 47. If a person's vote be challenged, and such challenge be not withdrawn after he shall have answerered the foregoing questions, or such of them as may be necessary, the judges of the election, or one of them, shall tender to him the following oath : '*You do* '*solemnly swear that you are a citizen of the United* '*States (or have declared your intention to become such)*; ' that you have been an inhabitant of the Territory of ' Nebraska for the last six months and of the county

'of ———— for the last twenty days, and of this 'precinct for the last ten days; that you have attained 'the age of twenty-one years, to the best of your knowl- 'edge and belief, and that you will support the Consti- 'tution of the United States and the Organic Act of 'this Territory.'

"SEC. 51. If any person challenged shall be guilty of wilful and corrupt swearing or affirming, in taking any oath or affirmation prescribed by this chapter, such person shall be adjudged guilty of wilful and corrupt perjury, and, upon conviction thereof, shall suffer the punishment attached by the laws of this Territory to the crime of perjury."

No. 11.

The election law in force at the time when James E. Boyd was voted for as Governor was as follows:

Chapter 26. Elections. Section 3. *Qualification of voters.* "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, in the county forty days, and in the precinct, township or ward ten days, shall be an elector: *First*, citizens of the United States. *Second*, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization at least thirty days prior to an election.

Constitution of 1875. Article 7, Section 1. (*Who are electors.*) "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, and in the county, precinct or ward for the term provided by law, shall be an elector. *First*, citizens of the United States. *Second*, persons of foreign birth who shall have declared their intentions to become citizens conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.

Executive Department.

SECTION 1. *(Officers)*—"The Executive Department shall consist of a Governor, Lieutenant-Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney-General and Commissioner of Public Lands and Buildings, who shall each hold his office for the term of two years from the first Thursday and (after) the first Tuesday in January next after his election, and until his successor is elected and qualified; provided, however, that the first election of said officers shall be held on the Tuesday succeeding the first Monday in November, 1876, and each succeeding election shall be held at the same relative time in each year thereafter. The Governor, Secretary of the State, Auditor of Public Accounts and Treasurer shall reside at the seat of government during their terms of office, and keep the public records, books and papers there, and shall perform such duties as may be required by law.

Sec. 2. *(Persons ineligible)* **"No person shall be eligible to the office of Governor, or Lieutenant-Governor, who shall not have attained the age of thirty years and been for two years next preceding his election a citizen of the United States and of this State. None of the officers of the Executive Department shall be eligible to any other State office during the period for which they shall have been elected."**

Election Law, Chapter 26:

"SEC. 97. *(Election declared void)* When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualifications on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void."

No. 12.

The 14th Amendment Construed.

The following is an extract from the Opinion of Mr. Justice MILLER *in the* SLAUGHTER HOUSE CASES (16 Wallace, pp. 72–74):

The first section of the fourteenth article to which our attention is more specially invited opens with a definition of citizenship—not only citizenship of the United States but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this Court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, *but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.*

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

Same doctrine: See Miller on the Constitution; lecture relating to Citizenship.

The following is an extract from the opinion of Mr Justice FIELD in the SLAUGHTER HOUSE CASES, 16 Wallace, pp. 93, 94, 95 and 96.

The amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National Government. It first declares that

" all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." It then declares that " no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The first clause of this amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the State, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the State. Such was the opinion of Mr. Calhoun and the class represented by him In his celebrated speech in the Senate upon the Force Bill, in 1833, referring to the reliance expressed by a Senator upon the fact that we are citizens of the United States, he said : " If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States ; and it is in this and no other sense that we are citizens of the United States."

In the Dred Scott case this subject of citizenship of the United States was fully and elaborately discussed. The exposition, in the opinion of Mr. Justice CURTIS, has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several States, under their constitutions and laws.

The Chief Justice, in that case, and a majority of the Court with him, held that the words "people of the United States" and "citizens" were synonymous terms; that the people of the respective States were the parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any State to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the descendants of persons brought to this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.

The first clause of the fourteenth amendment changes this whole subject and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State or city or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates. the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State or by the residence of the citizen therein. They do not derive their existence from its legislation and cannot be destroyed by its power.

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate

or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the Court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

The following is an extract from the opinion of Mr. Justice BRADLEY *in the* SLAUGHTER HOUSE CASES, *pp. 112–113:*

The first of these questions is one of vast importance and lies at the very foundations of our Government. The question is now settled by the Fourteenth Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. The States have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence and

sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union, subject to such regulations as the Legislature may rightfully prescribe. If a man be denied full equality before the law he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the State where he resides, what in general are the privileges and immunities of a citizen of the United States? Is the right, liberty or privilege of choosing any lawful employment one of them?

The following is an extract from the opinion of Mr. Justice SWAYNE *in the Slaughter House cases (p. 126):*

The first section of the fourteenth amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer, the intent and purpose sought to be carried out.

(1) Citizens of the States and of the United States are defined.

(2) It is declared that no State shall, by law, abridge the privileges or immunities of citizens of the United States.

(3) That no State shall deprive any person, whether a citizen or not, of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a State is *ipso facto* a citizen of the United States. [But *quære.*] No one can be the former without being also the latter; but the latter, by losing his residence in one State without acquiring it in another, although he continues to be the latter, ceases for the time to be the former.

The following is an extract from the opinion of Chief-Justice Waite in Minor vs. Happersett, 21 Wallace, 162:

The Court there held unanimously that women born of citizen parents within the jurisdiction of the United States are citizens, but that the right of suffrage was not necessarily one of the privileges or immunities of citizenship either before or after the adoption of the Fourteenth Amendment; therefore, a provision in a State constitution which confines the right of voting to "male citizens of the United States" is no violation of the Federal Constitution, nor of the Fourteenth Amendment, and that in such a State women have no right to vote.

The Chief Justice says (p. 167):

Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and, was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides that "no person except a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President," and that Congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization.

On page 172 he says:

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, "every male inhabitant of each town and parish with town privileges and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request" were its voters; in Massachusetts, "every male inhabitant of twenty-one years of age and upwards having a freehold estate within the commonwealth of the annual income of three pounds or any estate of the value of sixty pounds;"

On page 173 he says:

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended would have been expressly declared.

On pages 177 and 178 he says:

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota and Texas.

Certainly, if the Courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued

can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

Extract from Elk vs. Wilkins.

In Elk vs. Wilkins, 112 U. S., 94, it was held by this Court that an Indian born a member of one of the existing Indian tribes within the United States, who had voluntarily separated himself from his tribe and taken up his residence among the white citizens of the State, but who had not been naturalized, or taxed, or recognized as a citizen by either the United States or the State, is not a citizen of the United States, and is not made such by the Fourteenth Amendment. Mr. Justice GRAY, delivering the opinion of the Court, says (*Ib.*, p. 101):

"An emigrant from a foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law. The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;' and 'the Congress shall have power to establish an uniform rule of naturalization.' * * * "Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute."

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Supreme Court of the United States.

October Term, 1891.

JAMES E. BOYD, *Plaintiff in Error*,
vs.
THE STATE OF NEBRASKA, on the relation of JOHN M. THAYER.

No. 1208.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION OF PLAINTIFF TO ADVANCE THE CASE ON THE DOCKET.

Comes the plaintiff in error and moves the Court to advance this case upon the docket, that the same may be heard at as early a day as the convenience of the Court will permit; and he begs leave to show in support of such motion:

That the suit involves the right to the office of Governor of the State of Nebraska, for the period of two years from the first Thursday after the first Tuesday of January, 1891, to which office the plaintiff in error was duly and in due form of law elected at a general election held in said State on the first Monday in November, 1890, as duly ascertained, announced, and proclaimed by the Legislature of such State on the 8th day of January,

1891. At the proper time, as fixed by law, after such ascertainment and announcement of the vote for Governor, he assumed the duties of such office, in manner as prescribed by the law of such State, and continued to discharge the same until the 5th day of May, 1891, when he was ousted from such office by the judgment and order of the Supreme Court of the State, it being the highest Court of the State in which such a decision could be made between the parties, upon the information of the relator herein and proceedings had thereon:—all of which was done against the remonstrance and exception of plaintiff in error. (Rec., 3–7; *Ib.*, 75).

In order to reach that conclusion, such Court passed upon certain Acts of Congress regulating naturalization, as well as acts of Congress providing for the admission of Nebraska into the Union, and such Court construed those acts adversely to the claim of plaintiff in error to rights under them.

The assignment of errors, in connection with the pleadings in the record, specifically show the jurisdiction of this Court. (Rec., 79).

And nearly one-half of plaintiff's term of office must expire before this cause can be finally determined, be that as early as possible; and if the case is permitted to remain and "bide its time" on the docket, not only will such term wholly expire, but it is quite probable two other general elections will be held in Nebraska before this controversy is finally disposed of.

Wherefore, &c., &c.,

A. H. GARLAND,
H. J. MAY.
Attorneys for plaintiff in error.